

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

Horticulture Award 2010  
(AM2014/231 & AM2016/25)

**23 December 2016**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS

### AM2014/231 & AM2016/15 – HORTICULTURE AWARD 2010

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## 1. INTRODUCTION

1. This submission is filed in accordance with the Directions issued by His Honour Vice President Catanzariti on 12 September 2016.
2. Ai Group proposes that the *Horticulture Award 2010* (**Horticulture Award**) be varied as reflected in the draft determination filed on 21 October 2016.
3. The variation is pursued under s.156 of the *Fair Work Act 2009* (**FW Act**) as part of the 4 Yearly Review of Modern Awards.
4. The variation is also pursued under s.160 of the Act on the basis that the existing coverage clause in the Horticulture Award is ambiguous and uncertain.
5. A joint s.160 application of Ai Group and The Mitolo Group was filed on 18 November 2016. An amended s.160 application was filed on 1 December 2016.
6. We understand that the Full Bench intends to hear the ss.156 and 160 matters concurrently.
7. A retrospective operative date of 1 January 2010 is sought given the exceptional circumstances which exist in relation to this matter. A retrospective operative date is permitted where a variation is made under s.160.

## 2. THE STATUTORY FRAMEWORK AND THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

8. Ai Group's proposed variation is being pursued in the context of the 4 Yearly Review which is being conducted by the Commission.
9. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
10. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).
11. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes ss.156 and 160.
12. We later address each element of the modern awards objective with reference to our proposed variation for the purposes of establishing that, having regard to s.138 of the Act, the claim should be granted. We also address why the variation is consistent with s.160 of the Act and why a retrospective operative date can and should be granted.
13. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*<sup>1</sup> provides the framework within which the Review is to proceed.
14. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the

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<sup>1</sup> 4 Yearly Review of Modern Awards: *Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>2</sup>

15. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated “as a matter of significance” and that “no particular primacy is attached to any of the s.134 considerations”. The Commission identified its task as needing to “balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”: (emphasis added)

[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.<sup>3</sup>

16. Ai Group's proposed variation is pursued under s.156 of the Act as well as under s.160 of the Act.
17. In the *Preliminary Jurisdictional Issues Decision*, the Full Bench made the following relevant comments about s.160 in the context of the 4 Yearly Review: (emphasis added)

[51] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Commission may vary a modern award to “remove an ambiguity or uncertainty or to correct an error”. These provisions continue to be available during the Review, either on application or on the Commission's own initiative.

[52] In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties will be provided with an opportunity to comment on any such proposed variation.

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<sup>2</sup> Ibid at [23]

<sup>3</sup> Ibid at [36]

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[57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the 'specified day'). The default position is that the 'specified day' must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive 'and' in s.165(2) that a variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

18. Ai Group's proposed variation aligns with the principles in the *Preliminary Jurisdictional Issues Decision* and accordingly should be granted.

### 3. THE HISTORY OF THE HORTICULTURE AWARD AND ITS COVERAGE

19. The development of the Horticulture Award during the award modernisation process clarifies that the Award was intended to cover work comprising packing, storing, grading, forwarding, washing and/or treating of horticultural crops in connection with a horticultural enterprise without locational limitation on where the work is performed.
20. Given this, varying the award in accordance with our proposal would ensure that it aligns with the award's intended coverage and remove ambiguity and uncertainty.

#### 3.1 Award modernisation developments

21. Whilst there were a number of pre-modern awards and NAPSAs which applied to horticulture businesses, the main pre-modern award upon which the terms of the Horticulture Award are based (including the coverage terms) is the *Horticulture Industry (AWU) Award 2000* (**Horticulture Award 2000**) which Ai Group was a party bound by.
22. This is evident from the following extract of the AIRC Full Bench's *Stage 2 Award Modernisation Decision* regarding the making of the Horticulture Award (emphasis added):

[60] We have revised the ordinary hours and overtime provisions of the exposure draft. The provisions in the Horticulture Award 2010 are generally in line with the relevant provisions of the *Horticulture Industry (AWU) Award 2000*, as it applies to what are referred to as the Schedule A respondents to that award. We have also included more extensive provisions for pieceworkers and included piecework provisions we consider are consistent with the requirements of the consolidated request. A number of other provisions have been altered to make the interaction with the NES clearer.<sup>4</sup>

23. The Horticulture Award 2000 consisted of three schedules, with one set of key conditions applying to Schedule A respondents and another set of key conditions applying to Schedule B and C respondents. Schedule A respondents were named employer respondents in Victoria, South Australia

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<sup>4</sup> [2009] AIRCFB 345



and New South Wales, whilst Schedule B and C respondents were named Victorian employers and 4 named employer organisations – Ai Group, VECCL, the VFF Industrial Association and the TFGA Industrial Association.

24. The coverage provisions which applied to the different schedules of the Horticulture Award 2000 applied to the packing, storing, grading, forwarding, washing and/or treating of horticultural crops in connection with a horticultural enterprise without limitation as to where the work was carried out. For example, the coverage provisions did not exclude the functions of packing, storing, grading, forwarding, washing and/or treating of horticultural crops from being performed at a different location to where the crops were grown.
25. In relation to Schedule A respondents, clause 6.1 provided that the following functions were covered: (emphasis added)
  - the dehydration of fresh fruits and/or partly dried fruits (clause 6.1.1(a));
  - the packing of fresh pears and all classes of citrus fruits (clause 6.1.1(b));
  - the processing of fruit juices (clause 6.1.1(c));
  - the cultivating, picking, packing and forwarding of fresh and/or dried fruits and canning fruits (clause 6.1.1(d)).
26. In relation to Schedule B and C respondents, clause 6.2 provided that the following functions were covered (emphasis added):
  - the cultivation, picking, dehydration, crystallisation, washing, juicing, canning, or any other processing, of fruits or vegetables (clause 6.2.1(a));
  - the storing, packing, or forwarding of fruits or vegetables (clause 6.2.1(b)); and
  - the preparation of vineyard products (clause 6.2.1(c)).

27. It is clear from the above that as long as any of the commercial activities referred in clauses 6.1 (for Schedule A respondents) and 6.2 (for Schedule B and C respondents) were undertaken, the relevant business would be covered under the Horticulture Award 2000 regardless of *where* the activities were carried out.
28. The earliest versions of the Exposure Draft for the Horticulture Award which were published during Stage 2 of the award modernisation process did not contain the words “storing, grading, forwarding” in the coverage clause.
29. Clause 4.2 of the Exposure Draft published on 3 April 2009, for example, defined “horticulture industry” as follows:

**4.2 Horticulture industry means:**

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or
  - (b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.
30. However, the coverage clause was later amended to include the words “storing, grading, forwarding,” making it clear that the award was intended to cover such functions.
31. On 26 August 2009, following an outcry from employers in the horticulture industry about the increased costs which would be imposed upon their businesses through the modern award, the then Deputy Prime Minister and Workplace Relations Minister, the Hon Julia Gillard MP, varied the Award Modernisation Request. The variation identified the following features of the horticulture industry which distinguish it from other industries:

**51. Where a modern award covers horticultural work, the Commission should:**

- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
- provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

32. Following the variation to the Award Modernisation Request, Ai Group and the NFF filed a joint application on 2 October 2009 to vary the Horticulture Award in a number of respects, including by inserting the words “storing, grading, forwarding” after the word “packing” in clause 4.2(a). The main rationale for this was to better align the award with coverage of the Horticulture Award 2000.

33. In considering the application, the Full Bench of the AIRC said: (emphasis added)

[13] There is no single existing instrument which could be said to apply generally in the industry. Further, it is necessary, when considering the various provisions, to have regard to the totality of the provisions in any particular instrument. There is no definitive information as to the application of the individual awards or NAPSAs. Whilst the provisions of all of the instruments are relevant to some degree, we think greatest weight should be given to the Horticulture Award 2000. That award is a major award. It operates, with respect to Schedule A, in Victoria, South Australia and New South Wales, with respect to Schedules B and C to named employers in Victoria and members of two Victorian employer associations, the Tasmanian Farmers and Graziers Association and the AiGroup.<sup>5</sup>

34. The Full Bench went on to say:

[16] We will insert the definition of “harvest period” as proposed by the NFF and the Ai Group. We will also insert “storing, grading, forwarding” into the coverage clause. Neither variation was opposed by the AWU.<sup>6</sup>

35. On the basis of this decision, the coverage clause of the Horticulture Award was expanded on 23 December 2009 to add the following underlined words to clause 4.2(a):

(a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

36. The following definition of “harvest period” was also inserted into the Horticulture Award:

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<sup>5</sup> [2009] AIRCFB 966

<sup>6</sup> Ibid

**harvest period** means the period of time during which the employees of the particular employer are engaged principally in the harvesting, grading or packing of horticultural crops

37. Ai Group's proposed variation is aimed at preserving the intended coverage of the Horticulture Award, and to remove ambiguity and uncertainty.
38. The award modernisation proceedings relating to the Horticulture Award are further discussed in section 5 of this submission.

### 3.2 The concept of the "farm gate"

39. In its *Stage 2 Award Modernisation Decision*, the Full Bench of the AIRC noted that:

[53] Our overall approach to coverage of the pastoral and horticulture awards is that they should be confined to agricultural production within the "farm gate".<sup>7</sup>

40. The term "farm gate" was not defined or explained by the Full Bench.
41. The AIRC's statement was made against the backdrop of arguments advanced by the AMWU that the coverage of the Horticulture Award should not cross over into food manufacturing activities previously covered by the *Food Preservers' Award 2000*. In light of this, the reference to the "farm gate" must be seen in the context of distinguishing between activities which are properly carried out as part of horticultural operations and those which are food manufacturing activities.
42. It is also important to note that the statement was made before the coverage clause of the Horticulture Award was expanded by the Full Bench in December 2009 (as discussed above).
43. The "farm gate" is not a reference to a physical barrier or 'gate' on a particular farm or piece of agricultural land. Rather "the farm gate" is a well-known **concept** in the horticulture industry which refers to the activities which are

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<sup>7</sup> [2009] AIRCFB 345

carried out by the producer up to the first point of sale from the producer to its customer/s.

44. The concept has no relevance to the location of work.
45. The producing of horticultural crops involves a number of integrated and interconnected processes that often take place across numerous physical locations, to ensure the most efficient use of resources and to meet production needs.
46. This includes activities at the beginning of the process, such as “sowing,” “planting” and “raising,” to those in the middle such as “cultivating,” “harvesting” and “picking” and finally to functions at the end of the process, before the crops are able to move from the horticultural enterprise to market, being activities such as “washing,” “packing,” “storing,” “grading,” and “forwarding.” These activities are all part of an integrated process in the horticultural production chain which cannot be considered in isolation or confined to a particular location.
47. The fact that activities such as washing and packing may be undertaken at different premises to where the crops are grown and harvested does not mean that they are “beyond the farm gate.” This is particularly so given that it has been held that “cleaning, sorting and bagging” are in fact “the last stages of harvesting.”<sup>8</sup>
48. Viewing the concept of “the farm gate” in this manner is consistent with the coverage of the Horticulture Award 2000 which, as discussed above, was the main pre-modern award the Horticulture Award was based on. Coverage under the Horticulture Award 2000 was not constrained by locational limitations and the Horticulture Award was not intended to be either.

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<sup>8</sup> *The National Union of Workers, South Australian Branch v Comit Farm Produce Pty Ltd* (No. 2) [1998] SAIRC 14 (20 March 1998)

49. If it had been the Award Modernisation Full Bench's intention to introduce a locational limitation to coverage under the modern Award it surely would have set out its intention and reasons for doing so during the award modernisation process. Instead, the Full Bench used the expression "farm gate" which has a well-understood meaning in the industry; a meaning which is not related to the location where work is carried out.

50. The concept of the "farm gate" is directly connected to the concept of the "farm gate price," which is commonly used for accounting purposes and economic analysis in respect of the horticulture industry.

51. The Organisation for Economic Co-operation and Development defines the term "farm gate price" as:

A basic price with the 'farm gate' as the pricing point, that is, the price of the product available at the farm, excluding any separately billed transport or delivery charge.<sup>9</sup>

52. This definition is consistent with the definition of 'farm gate price' in the Collins English Dictionary, which defines the term as:

The price for the sale of farm produce direct from the producer.<sup>10</sup>

53. The concept of the "farm gate price" is also used by the Australian Bureau of Statistics (**ABS**) for the purpose of agricultural statistics. In this context, the ABS refers to prices at the farm gate as "local value." The term "local (basic value)" is defined by the ABS as:

The value of agricultural commodities at the point of production. Local value is derived by subtracting the marketing costs from Gross value. Marketing costs are defined as the cost of moving agricultural commodities from the point of production (farm) to the point of sale.<sup>11</sup>

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<sup>9</sup> OECD Glossary of Statistical Terms – Farm Gate Price Definition. Available at: <https://stats.oecd.org/glossary/detail.asp?ID=940>

<sup>10</sup> See: <https://www.collinsdictionary.com/dictionary/english/farm-gate-price>

<sup>11</sup> Australian Bureau of Statistics, Value of Agricultural Commodities Produced. Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/F276A671BC2F9899CA256F0A007D8CB1?OpenDocument>

54. “Gross value” (as referred to in the above definition) is defined by the ABS as:

The value of production at the point of sale (i.e. where it passes out of the Agricultural sector of the economy). It is the value placed on recorded production at wholesale prices, realised in the market place.<sup>12</sup>

55. It is evident from the above that the “farm gate price” or “value” of a cultivated product is generally considered to be the price of the product before it leaves the producer and is transported to the first point of sale (i.e. to either a retailer like Coles or Woolworths, or to a food manufacturing company like Simplot, Nestle, Mondelez or Heinz). In other words, it is the price of the product at which it is sold by the primary producer and therefore does not include the additional costs that would be included once the product has reached the market place.

56. The “farm gate price” of horticultural crops is the value of the crops at the end of the horticultural process, that is, once the crops have been grown, cultivated, harvested, washed, sorted, graded, packed and bagged by the producer and are ready to go to market. It is not the value of crops at a specific, physical location or ‘gate’ but the value of the crops at the completion of the horticultural process, regardless of where the activities are carried out.

57. The witness statements of Robin Anne Davis and Bryan Robertson, both of whom have a great deal of experience and expertise in the horticulture industry, strongly support this conception of the term “the farm gate.”

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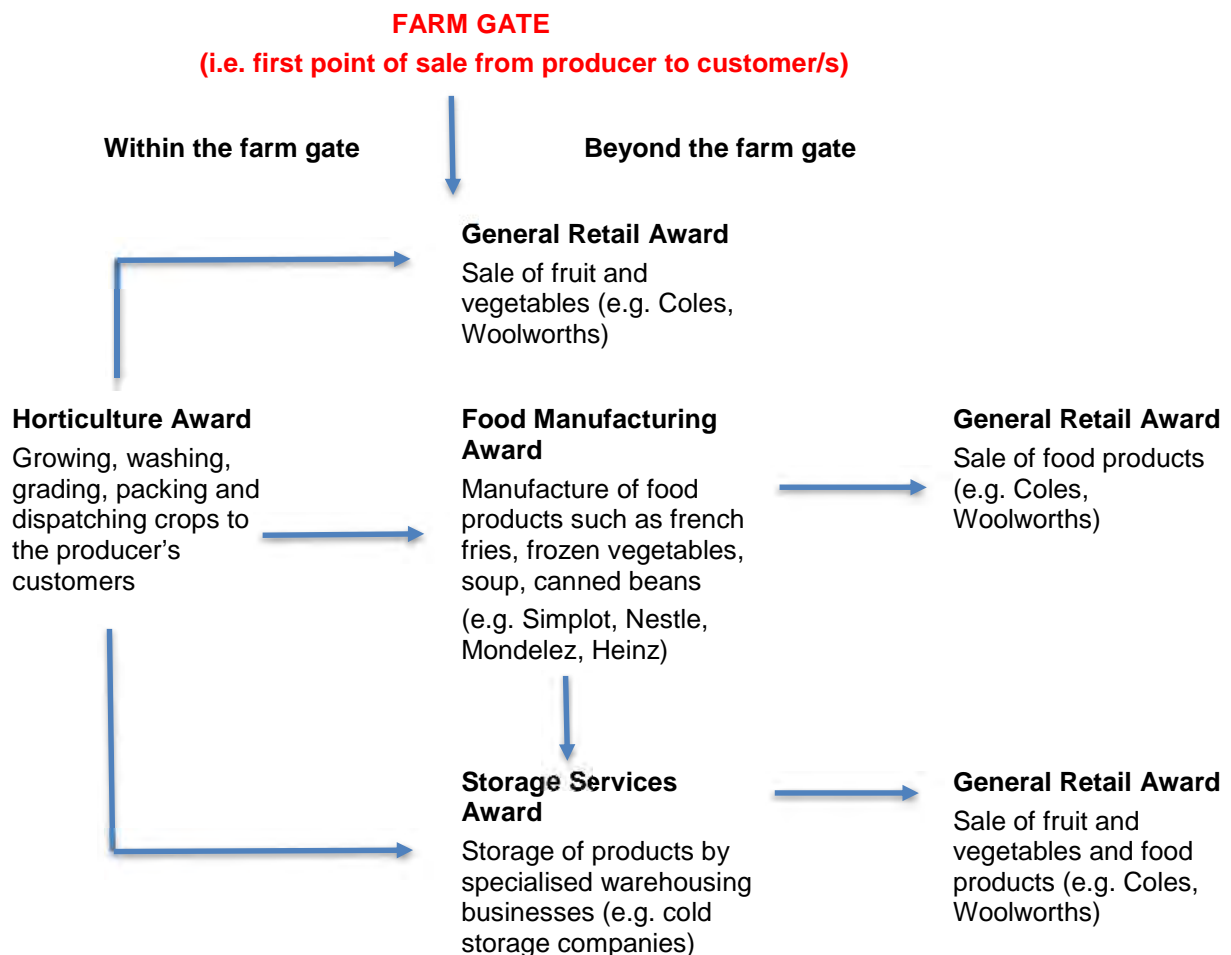
<sup>12</sup> Ibid

## 4. THE COVERAGE OF RELEVANT AWARDS IN THE SUPPLY CHAIN

### 4.1 The dividing lines between the coverage of particular awards

58. In considering the intended coverage of existing relevant awards and the merits of the variation proposed by Ai Group, it is important to consider the coverage of relevant awards in the supply chain and the appropriate dividing lines between coverage, as set out in the diagram below:

**Diagram 1: Award coverage within the supply chain in the horticulture and related industries**





59. The above diagram is eminently logical. It reflects the existing industry practice. It is also consistent with numerous developments during the award modernisation process.
60. Relevant award modernisation developments relating to the Horticulture Award are set out in sections 3.1 and 5 of this submission.
61. Relevant award modernisation developments relating to the *Food, Beverage and Tobacco Manufacturing Award 2010* (**Food Manufacturing Award**) and the *Storage Services and Wholesale Award 2010* (**Storage Services Award**) are set out below.

## 4.2 Food manufacturing award modernisation developments

62. Ai Group was the main employer group involved in the development of the Food Manufacturing Award. The terms of the award were based on a draft that Ai Group submitted to the AIRC as highlighted in the following extract from the AIRC's Stage 3 Award Modernisation Statement:<sup>13</sup> (emphasis added)

"[87] The exposure draft is largely based on that submitted by the AiGroup. However, the definition of "food, beverage and tobacco manufacturing" has been altered to reduce the potential for overlap with other modern awards and exposure drafts. Further, the draft specifically excludes those covered by the Manufacturing Modern Award and the proposed Meat Industry Award 2010, Poultry Processing Award 2010 and Wine Industry Award 2010. Our preliminary view is that the award should not cover clerical employees."

63. During the Stage 2 Award Modernisation consultations, the AIRC was mindful of arguments advanced by the AMWU that the coverage of the Horticulture Award ought not cross over into food manufacturing activities previously covered by the *Food Preservers' Award 2000*. The AMWU's Food Preservers Award and the NUW's Manufacturing Grocers' Award were the two main pre-modern food manufacturing awards. The following extract from the AMWU's 31 October 2008 submission in the Stage 2 Award Modernisation proceedings is relevant:

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<sup>13</sup> [2009] AIRCFB 450.

5. **Overlap with Food Preservers' Award 2000 – AP781106CRV**
6. The AMWU seeks an exemption from the Agriculture Awards for the Food Preservers Award 2000 and specifically the industry that the Food Preservers' Award 2000 covers. The conditions and entitlements for the employees outlined in the Food Preservers' Award 2000 play an extremely significant role in determining what should be the industry "fair minimum safety net" and work regulated by that award should be considered in Stage 3 and excluded from any proposed Agriculture Awards.
7. A comparison of the coverage clauses of the Food Preservers' Award 2000 and the Horticultural Industry (AWU) Award 2000 reveals specific areas of overlap in the two industries. The comparison is attached at Appendix A at page 9 herein.
8. In summary, the key areas of overlap are:
- a. Dehydration of fruits or vegetables
  - b. Crystallisation of fruit or vegetables
  - c. Juicing or processing of fruit juices
  - d. Canning of fruits or vegetables
  - e. "any other processing," of fruits or vegetables
9. The AMWU understands that the processes of dehydration and crystallisation require the establishment of a purpose built plant and with the advent of increased regulation for food preparation, the dehydration and crystallisation of fruits is no longer conducted absent a fully established plant as may have been the case for respondents to the awards superseded by the Horticultural Industry (AWU) Award. The processing of fruits and vegetables in wholly established plants has traditionally been regulated by the Food Preservers' Award 2000.
10. The AMWU understands that there are currently no respondents to the Horticultural Industry (AWU) Award 2000 that perform the work of, Canning of fruits or vegetables, which is another activity requiring the establishment of plants. Parties should provide evidence of this activity if they contend that canning can be done without a purpose built plant upon a farm. If canning has been regulated by both awards, the appropriate fair minimum safety net should be the Food Preservers' Award 2000.
11. There are only four (4) respondents to the Horticultural Industry (AWU) Award 2000 that engage in Juicing or processing of Juice. Six Berri Limited related companies are also respondents to the Food Preservers' Award 2000. Along with the six Berri related respondents to the Food Preservers' Award, the Food Preservers' Award 2000 also has another thirty-one (31) incorporated respondents who engage in juicing or juice processing. Based on this analysis, it is clear that the Food Preservers' Award 2000 is the predominant Award for Juicing and Juice Processing and is the appropriate fair minimum safety net for this type of work.
12. The AMWU is opposed to the open ended statement, "any other processing, of fruits and vegetables," being included in the proposed Application clause of the modern Agriculture Award/s. The bulk of processing and manufacture of fruit and vegetable products from fresh fruit and vegetables is not regulated by an Award within the Agriculture Group.
13. The conditions and entitlements of the Food Preservers' Award 2000 and the Horticultural Industry (AWU) Award 2000 differ significantly. Further submissions on this point will be made at the consultations.

14. It is the AMWU's submission that the Food Preservers' Industry as described by the Food Preservers' Award 2000 has specific conditions and entitlements and industry characteristics that require it to be considered separately from the Agriculture Industry. Therefore the AMWU seeks an exclusion from the modern Agriculture Award/s for the Food Preservers' Award 2000 and the industry that it regulates.
64. The AIRC was also mindful of arguments advanced by the NUW that specialised cold storage companies should be covered under the Storage Services Award because the storage of goods is their principal business and not an incidental part of their business. The following relevant submissions were made by Mr Paul Richardson of the NUW (now the Assistant National Secretary) during the Stage 3 award modernisation consultations before Senior Deputy President Acton regarding the Food Manufacturing Award:<sup>14</sup> (emphasis added)

PN234

In respect therefore of the proposed food award, we say that there are a number of issues that arise from the submissions of AI Group and to a certain extent by the CFMEU and the AMWU. Our preferred position is for sectoral awards but we do acknowledge that there is a food industry that can be defined. The difficulty that the NUW sees and encourages the Commission to cast its attention to is that the proposed coverage of the food award put forward by the AI Group does not acknowledge certain sectors of the industry properly and I wish to take you through several examples to illustrate that point and I should add that our submissions today are effectively therefore limited to the issues of coverage and to the extent that coverage is something that should be understood in the context of the proposed classifications.

PN235

In other words, we do not make any submissions as to rates, and conditions of employment generally. We believe that much of those matters are in effect settled and there is an onus to make out exceptions in respect of those matters. So if I can firstly turn to the example of the award to which my organisation is respondent the Butter Factories and Condensories Award if I can use its short title. In making this brief submission I dare say that it is the case for other awards or NAPSs that also apply in the dairy industry. That is that there is a longstanding recognition of certain activities being the equivalent in the level of skill and therefore the minimum rate of pay to that of tradespersons.

PN236

I just take one specific example, a cheese maker within the Butter Factories and Condensories award is somebody who is classed as having completed an Associate Diploma and is recognised as being equivalent to a tradesperson in terms of minimum rates. So there are – the point that I seek to make is that there are some activities or there are some occupations that relate to the manufacture, or preparation of food and

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<sup>14</sup> Transcript of proceedings, Acton SDP, 16 March 2009

food product that will not fit within the proposed structure put forward by the AIG. In fact we would say that the five level structure that the AI Group puts forward over simplifies the variety of functions, tasks and skills required in those sectors, or at least in some sectors of the food industry that the NUW has interest and the occupational classification of cheese maker is one such example.

PN237

Secondly, as we understand the proposed award put forward by AI Group it fails we say with respect to properly comprehend those activities. In our submission that industry that currently falls within the frozen goods award we say that the activities within that award can fall into two areas. Firstly there are manufacturers of food who operate a cold store. The easiest example would be the other major ice cream manufacturer Nestle which owns Peter Ice Creams that have Mr Terzic's members interests. They operate a cold store, ice cream is held there before it's dispatched to a retail outlet.

PN238

However there are a large number of other cold store operators who handle frozen goods that have no relationship to the food manufacturing industry at all, save and except that most if not all of the product that they store is food. They are third party logistics providers. Let me just give a few examples. Oxford Cold Storage, Versacold, Polar Fresh, PFD Food Service, these are all third party logistic supplies. They either hold food on behalf of a retailer, or a group of retailers, or they buy food in the form of – and then provide it to the trade in the form of food service.

PN239

Now we say with respect that there are particular activities and particular types of work that occur within those operations that are akin to the sort of classifications one sees in those awards that are known as storage services that are before as I understand it his Honour Senior Deputy President Kaufman and are perhaps better dealt with yet by his Honour at least in respect of those third party logistic providers. We would acknowledge or we would concede that in the case of the ice cream manufacturer who operates a cold store, to hold finished product before it being moved either to a third party provider or to a retail outlet is an activity that could be reasonably and certainly industrially described as incidental or ancillary to the manufacture of the food product. We don't think that AI Group has properly comprehended that group of frozen goods employers.

65. After considering the various arguments of Ai Group, the AMWU, the NUW and the other relevant parties, the AIRC determined the coverage clause of the Food Manufacturing Award. The key coverage definition in the Food Manufacturing Award is:

**food, beverage and tobacco manufacturing** means the preparing, cooking, baking, blending, brewing, fermenting, preserving, filleting, gutting, freezing, refrigerating, decorating, washing, grading, processing, distilling, manufacturing and milling of food, beverage and tobacco products, including stock feed and pet food, and ancillary activities such as:

- (a) the receipt, storing and handling of ingredients and raw materials to make food, beverage and tobacco products, including stock feed and pet food;

- (b) the bottling, canning, packaging, labelling, palletising, storing, preparing for sale, packing and despatching of food, beverage and tobacco products, including stock feed and pet food;

### 4.3 Storage services award modernisation developments

66. Ai Group was the main employer group involved in the development of the Storage Services Award. The main area of contention between Ai Group and the NUW concerned the coverage of the award, and the potential disturbance in coverage of numerous industry awards.
67. Ai Group had no difficulty with the Storage Service Award covering the types of companies referred to by Mr Richardson in the abovementioned extract from the transcript of the Stage 3 consultations (see PN238 and PN239). However, stores and warehousing functions are carried out in numerous industries and Ai Group was determined to ensure that these functions remained covered under the industry awards for the relevant industries.
68. In its Stage 3 pre-exposure draft submission of 6 March 2009,<sup>15</sup> Ai Group stated: (emphasis added)

#### Chapter 22 – Storage Services

223. The Commission's list of indicative awards for the Storage Services Industry identifies 26 Awards or NAPSAs, excluding enterprise instruments, for consideration as part of the Storage Services Industry within Stage 3 of award modernisation.

#### **It is essential that any modern Storage Services Award not cover storepersons who are covered by any other industry award**

224. It is extremely important that any modern Storage Services Award not intrude upon the coverage of the industry awards which cover storepersons. There are a large number of these awards. For example, the Metal Industry Award has always covered storepersons and the NUW's responsency to the award has revolved around this. Another example is the existing Business Equipment – Technical Service – Award. It covers storepersons and, again, the NUW is a respondent to the award to represent such workers. The Graphic Arts Award and the Rubber, Plastic and Cablemaking Industry Awards are further examples of awards that cover storepersons.
225. In manufacturing industries the stores / warehouse functions are typically highly integrated into the production process, regardless of whether the store contains materials and/or parts for use in production, or finished goods.

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<sup>15</sup> Ai Group Submission, Award Modernisation – Stage 3 – Storage Services, 6 March 2008, pages 68 to 70. See [http://www.airc.gov.au/awardmod/databases/storage/Submissions/AIG\\_allstage3.pdf](http://www.airc.gov.au/awardmod/databases/storage/Submissions/AIG_allstage3.pdf)

226. The federal Storage Services General Award 1999 contains a classification structure and wage rates which would be highly problematic if applied to storepersons in industries where stores work is currently covered under the relevant industry award.
227. With the above extremely important qualification relating to its coverage, Ai Group supports the making of a modern storage services award.

#### **Ai Group's draft Storage Services Award 2010**

228. Ai Group has drafted a modern *Storage Services Award 2010 (Annexure H)* for the Commission's consideration. On the whole, the Ai Group version of the Award is based on the *Storage Services General Award 1999*.
229. The coverage clause of Ai Group's draft Storage Services Award 2010 reads:  
*"This award covers employers throughout Australia in the storage services industry and their employees."*
230. The draft award contains the following definition of the industry:  
*"Storage services industry means the receiving, unloading, handling, storing, packing, sorting, preparation of goods to order, loading, preparation for despatch and despatch of goods and merchandise, wares, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a warehouse facility"*
231. The intent of the coverage clause is to ensure that the scope of the Award does not inadvertently extend coverage of the Award to employers operating in other industries. In order to ensure this, subclause 4.2 provides for a general exclusion.
232. In an abundance of caution and in response to submissions made by other parties with regards to the coverage of the Road Transport and Distribution during Stage 2 of award modernisation, Ai Group has also included specific exclusions from coverage in clause 4.3 of our draft, as follows:  
*"This award does not cover employers and employees covered by the following awards:*
- *The Manufacturing and Associated Industries and Occupations Award 2010;*
  - *The Road Transport (Long Distance Operations) Award 2010;*
  - *The Road Transport and Distribution Award 2010"*
69. As identified in the above submission, the draft award that Ai Group submitted contained a subclause 4.2 which contained a general exclusion to prevent the award extending to employers operating in other industries that employ stores and warehousing employees.

70. The NUW opposed Ai Group’s proposed exclusion,<sup>16</sup> but the Full Bench accepted Ai Group’s arguments and an appropriate exclusion was incorporated into the Storage Services Award
71. Clause 4.2(a) of the Storage Services Award states:
- 4.2 Notwithstanding clause 4.1, the award does not cover:
- (a) an employer to the extent that the employer is covered by another modern award that contains classifications relating to functions included within the definition of the storage services and wholesale industry with respect to any employee who is covered by that award;
72. The Storage Services Award covers “*employers throughout Australia in the storage services and wholesale industry and their employees in the classifications listed in clause 14—Classifications of that award*”.<sup>17</sup>
73. The Storage Services Award defines “storage services and wholesale industry” as the receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, dispatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary.
74. Despite the breadth of the definition of “storage services and wholesale industry, the coverage of the Storage Services Award is limited by subclause 4.2(a) as extracted above.
75. Clause 4.2(a) of the Storage Services Award operates to exempt employers who employ employees to perform the functions included within the definition of “storage services and wholesale industry” in the award<sup>18</sup> if another modern award covers that employer and the award contains classifications relating to the abovementioned functions. These functions are the “*receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting,*

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<sup>16</sup> NUW Submission, Award Modernisation – Stage 3 – Storage Services, 7 April 2008, [http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW\\_further\\_storage.pdf](http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW_further_storage.pdf); Also see NUW mark-up of Storage Services and Wholesale Award 2010 exposure draft dated 9 May 2009, 19 June 2009, [http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW\\_wholesa\\_ed.doc](http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW_wholesa_ed.doc)

<sup>17</sup> See Storage Services and Wholesale Award 2010, clause 4.1.

<sup>18</sup> Storage Services and Wholesale Award 2010, clause 3.1.

*loading, dispatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary*".<sup>19</sup>

76. Consistent with subclause 4.2(a) of the Storage Services Award, the Horticulture Award contains classifications relating to functions included within the definition of the "storage services and wholesale industry". For example, the classification structure of the Horticulture Award includes, as indicative tasks, the sorting and packing of produce<sup>20</sup> and inventory and store control.<sup>21</sup> Furthermore, the Horticulture Award lists the activities of packing, storing and forwarding of fruit and vegetables within its coverage clause at 4.2(a).
77. It can be seen from the intent and effect of clause 4.2(a) of the Storage Services Award, that the award was not intended to apply to employers within the horticulture industry, manufacturing industry, graphic arts industry, business equipment industry, and numerous other industries where packing, storing and despatch functions are carried out, and the relevant industry award includes such functions.

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<sup>19</sup> Storage Services and Wholesale Award 2010, clause 3.1.

<sup>20</sup> Clauses B1.1.3 and B1.2.3 of the Horticulture Award.

<sup>21</sup> Clause B.4.3 of the Horticulture Award.



## **5. THE CURRENT COVERAGE CLAUSE IN THE HORTICULTURE AWARD**

78. Clause 4.1 of the Horticulture Award provides that the Award:

“covers employers throughout Australia in the horticulture industry and their employees in the classifications listed in Schedule B – Classification Structure and Definitions, to the exclusion of any other modern award.”

79. Clause 4.2 of the Horticulture Award, as presently drafted, defines “horticulture industry” as:

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or
- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.

80. It is clear from clause 4.1 that coverage under the Horticulture Award is determined by reference to two elements:

- firstly, the employer must be in the relevant industry as defined by the award (clause 4.2); and
- secondly, the employer’s employees must be covered by the relevant classifications listed in the Award (Schedule B).

### **5.1 The meaning of “horticulture industry” (clause 4.2)**

81. In respect of clause 4.2, the meaning of clause 4.2(a) is of most relevance to these proceedings. The meaning of clause 4.2(b) does not appear to be contested or contentious.

82. In relation to the meaning of “horticulture industry”, clause 4.2(a), as presently drafted, is not limited to activities or work carried out at or on a particular location.

83. The orthodox and correct approach in understanding the expression “includes” (and hence “including” as used in clause 4.2(a) is that it enlarges the ordinary meaning of the word/s.<sup>22</sup> Therefore, the references to “fruit,” “vegetables,” “farms,” “orchards” and “plantations” in clause 4.2(a) are not exhaustive but merely examples. This can be illustrated by considering the example of flower market gardens:

- The planting and picking of flowers in a flower market garden is intended to be included within the coverage of the Award but flowers are not “fruit” or “vegetables.”
- A flower market garden is not an “orchard” or “plantation.”
- If a broad interpretation is adopted for the expression “farm” then a flower market garden may be a “farm,” but some people may not consider it to be a farm.

84. As can be seen, it does not matter whether a flower market garden is a “farm,” “orchard” or “plantation.” These words, as the Full Bench of the FWC in *Mitolo Group Pty Ltd v National Union of Workers (Mitolo)*<sup>23</sup> acknowledged, appear after the expression “including” and are therefore not exhaustive. They merely confirm that the reference to horticultural crops in clause 4.2(a) includes “*fruit and vegetables upon farms, orchards and/or plantations.*”

85. Given the above, the correct interpretation of clause 4.2(a) is that an employer will be in the “horticulture industry”, and covered by the Horticulture Award, if it is in the industry of “*agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing storing, grading, forwarding or treating of horticultural crops.*”

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<sup>22</sup> Pearce and Geddes, *Statutory Interpretation in Australia*, Seventh Edition, p.248

<sup>23</sup> *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 at [45]

86. Importantly, clause 4.2(a) does not specify that the activities referred to need to be undertaken “at”, “on” or “in” an agricultural holding, flower or vegetable market garden. Rather the clause specifies that the activities need to be “in connection with” agricultural holdings, flower or vegetable market gardens.
87. The words “in connection with” do not, on their plain and ordinary meaning, impose a restriction on where the said activities are undertaken. Instead they qualify coverage by specifying that there needs to a “connection” between agricultural holdings, flower or vegetable market gardens and the activities. Such a connection would be satisfied if the “sowing,” “planting,” “raising,” “cultivation,” “harvesting” and “picking” of horticultural crops took place on agricultural holdings but the “packing,” “storing,” and “grading” of these crops took place elsewhere.
88. By contrast, there are a number of other modern awards that expressly specify that coverage is limited to work performed “at”, “on” or “in” a particular location. For example:
- Clause 4.2(a) of the *Nursery Award 2010* specifies that the ‘nursery industry’ means “*the propagation, planting, growing, cultivation, maintenance, sale, distribution or treating of plant material and associated nursery products in plant nurseries, flower, turf and tree farms or other similar enterprises;*”
  - Clause 3.1 of the *Dry Cleaning and Laundry Industry Award 2010* specifies that the ‘dry cleaning and laundry industry’ means, amongst other things, “*dry cleaning, dyeing and/or repairing and/or invisible mending of garments or articles in dry cleaning establishments or their auxiliary receiving depots;*”
  - Clause 4.1 of the *Racing Clubs Events Award 2010* specifies that the award covers “*employers throughout Australia engaged in the staging of events at horse and greyhound racing venues, including but not limited to thoroughbred, harness, trotting and greyhound racing clubs,*

*and their employees in the classifications listed in clauses 17 and 18 to the exclusion of any other modern award.”*

89. If the Horticulture Award was intended to be limited by location, surely the AIRC would have drafted the coverage clause in a similar manner to the above examples to evince this intention.
90. During the award modernisation process, the definition of “horticulture industry” developed in the following manner.
91. In a draft award submitted by the AWU on 31 October 2008, “horticulture industry” was defined as follows:
- 4.3 Horticulture Industry means all employees who are employed in classifications in this award:
- (a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticultural products and crops, including fruit and vegetables; or
  - (b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural products and crops, including fruit and vegetables; or
  - (c) the storing, canning, grading, processing, packing or despatching horticultural products and crops,
92. An NFF draft award submitted on 31 October 2008 proposed the following definition:
- 4.2 For the purpose of clause 4.1 Horticultural Industry includes:
- (a) the management, cultivation, picking, dehydration, crystallisation, washing, juicing, processing, canning, storing, grading, preparation for packing, packing and/or forwarding of horticultural products; and
  - (b) the preparation and treatment of land or other growing medium for any of the purposes in clause 4.2(a); and
  - (c) preparation of vineyard products where this is ancillary to activities in clause 4.2(a).
93. On 24 November 2008, the Horticulture Australia Council (**HAC**) submitted a draft award with the following coverage provision:
- 4.3 This award applies to employees employed in the Horticulture Industry who are engaged in activities including the following:

- (a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticulture industry products and crops, including fruit and vegetables; or
- (b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticulture industry products and crops, including fruit and vegetables; or
- (c) the storing, canning, grading, processing, packing or despatching horticulture industry products and crops; or
- (d) producing compost for, cultivating, picking, preparing for packing, packing and/or forwarding of fungi or mushrooms; or
- (e) upon plant nurseries, flower, turf, tree farms or other similar enterprises in connection with the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; the production and modification of growing media and clearing, treating or preparing of land for the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; or the processing, grading, packing, storing, dispatching and distribution of plant material and associated products.

94. It can be seen that the abovementioned AWU, NFF and HAC draft awards all clearly covered treatment, packing, storing and despatch of horticultural products by horticulture businesses, regardless of the location where such activities were carried out.

95. On 10 December, the AWU filed an amended draft award with the following additions (as underlined) to the definition of “horticulture industry”, that the draft award noted had been proposed by HAC:

4.3 Horticulture Industry means all employees who are employed in classifications in this award:

- (a) upon farms, orchards, plantations, agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticultural products and crops, including fruit and vegetables; or
- (b) at clearing, fencing, trenching, draining or otherwise preparing or treating land or other growing medium for the sowing, raising, harvesting or treating of horticultural products and crops, including fruit and vegetables; or
- (c) the storing, canning, grading, processing, packing, despatching or forwarding horticultural products and crops,
- (d) producing compost for cultivating, picking, preparing for packing, packing, and/or forwarding of fungi or mushrooms.

96. The exposure draft published on 23 January 2009 included the following definition of “horticulture industry”:

4.2 Horticulture industry means:

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or
- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables

97. The above definition was unchanged in the award that came into operation on 1 January 2010.

98. As discussed in section 3 above, following a variation to the Award Modernisation Request, Ai Group and the NFF filed a joint application on 2 October 2009 to vary the Horticulture Award in a number of respects, including by inserting the words “storing, grading, forwarding” after the word “packing” in clause 4.2(a).

99. In its decision varying the Award, the Full Bench stated:

**[16]** We will insert the definition of “harvest period” as proposed by the NFF and the Ai Group. We will also insert “storing, grading, forwarding” into the coverage clause. Neither variation was opposed by the AWU.<sup>24</sup>

100. On the basis of this decision, the coverage clause of the Horticulture Award was amended on 23 December 2009 to add the following underlined words to clause 4.2(a):

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

101. It appears that the NUW had no involvement in the horticulture award modernisation proceedings, or in the proceedings relating to the Ai Group and NFF joint application to vary the Award in late 2009. The NUW did not file written submissions or appear at the consultations. Therefore, the NUW

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<sup>24</sup> Ibid

cannot claim that the coverage of the Horticulture Award was in any way narrowed to take account of the coverage of the Storage Services Award. This issue was not raised in the proceedings.

102. All of the main parties involved in the Horticulture Award proceedings intended that treatment, packing, storing and despatch of horticultural products by horticulture businesses should be included within the coverage of the Award, regardless of the location where such activities were carried out.
103. In ascertaining the intended meaning of clause 4.2(a), it is important that the clause's terms are considered as a whole in light of their contextual, historical and industrial context. In this regard, the terms should be construed by reference to the relevant authorities on award interpretation.
104. In *Amcor v CFMEU*,<sup>25</sup> Kirby J said: (emphasis added)

"The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial instruments and especially certified agreements. I agree with the following passage in the reasons of Madgwick J in *Kucks v CSR Ltd*, where his Honour observed:

"It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

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<sup>25</sup> *Amcor v CFMEU* (2005) 222 CLR 241 at 271

105. The above passage from *Kucks v CSR Ltd*<sup>26</sup> was also quoted with approval by Callinan J in *CFMEU v Amcor*.<sup>27</sup>

106. In *Short v Hercus*,<sup>28</sup> Burchett J made the following comments about the construction of a clause in the *Metal Industry Award 1984*: (emphasis added)

“The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not just be assumed, as in an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read.”

107. Burchett J went on to state:<sup>29</sup> (emphasis added)

“But even if the language, read alone, appeared pellucidly clear, the tendency of recent decisions... would seem to require the court to look at the full context. Only then will all the nuance of language be perceived....”

108. The above authorities highlight the importance of considering the overall context in interpreting the coverage clause in the Horticulture Award, including the history of the award and its purpose.

109. Taken in its historical and industrial context, clause 4.2(a) of the Horticulture Award was not intended to be confined to activities carried out on a piece of land where crops are grown. The integrated processes involved in producing horticultural products are often undertaken at multiple locations, and the Award Modernisation Full Bench, and the individual AIRC Members involved in the Horticulture Award consultations, would have understood this. The use by the Full Bench of the phrase “farm gate” (a phrase that has a particular

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<sup>26</sup> *Kucks v CSR Ltd* (1996) 66 IR 182

<sup>27</sup> *Amcor v CFMEU* (2005) 222 CLR 241 at 282-283

<sup>28</sup> *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518

<sup>29</sup> *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518-519.



meaning in the Horticulture Industry) indicates that the Full Bench understood the nature of the industry. The “farm gate” is not a physical location; it is a concept (see section 3.2 above).

110. In order to ensure that the Horticulture Award meets the modern awards objective by being “simple” and “easy to understand,” clause 4 should be amended in accordance with our proposed variation to clarify the Award’s intended coverage. The clause should also be amended for the reason that the current provision is ambiguous and uncertain.

## **5.2 The classifications in the Horticulture Award (Schedule B)**

111. In order to be covered by the Horticulture Award, the employees of an enterprise that is covered by clause 4.2 must also be covered by the relevant classifications in the Award.

112. In this regard, the classifications in Schedule B of the Award undoubtedly include the packing, storing, grading, forwarding, washing and treating of horticultural crops.

113. For example, in clause B.1.3, the indicative tasks of a Level 1 Employee include:

- performing general labouring duties;
- performing a range of housekeeping tasks in premises and grounds;  
and
- sorting, packing or grading of produce where this requires the exercise of only minimal judgment.

114. Similarly, in clause B.2.3, the indicative tasks of a Level 2 Employee include:

- performing a range of tasks involving the set up and operation of production and/or packaging or picking equipment, labelling and/or consumer picking equipment;

- repetition work on automatic, semi-automatic or single purpose machines or equipment;
- assembling/dismantling components using basic written, spoken and/or diagrammatic instructions in an assembly environment;
- sorting, packing and grading beyond the scope of Level 1 duties;
- using hand trolleys, pallet trucks or other mechanical or power driven lifting or handling devices not requiring a licence;
- operating tractors with engine capacity of up to 70 kW; and
- general and routine product testing.

115. Further, the indicative tasks for Level 3, 4 and 5 Employees in Schedule B also clearly cover functions connected to the washing, grading and packing of horticultural crop (albeit at a higher skill level).

116. Indeed, Deputy President Bartel at first instance in the *Mitolo* case accepted that the classifications in Schedule B of the Horticulture Award were more aligned with the duties undertaken by the relevant employees in the Mitolo washing, grading and packing facility than the classifications in the Storage Services Award.<sup>30</sup>

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<sup>30</sup> [2014] FWC 2524 at [84].

## 6. THE MITOLO CASE

117. The decision of the Full Bench in *Mitolo*<sup>31</sup> adds weight to the argument that the coverage clause in the Horticulture Award should be amended.

118. The Full Bench invited parties to pursue changes to the coverage of the Horticulture Award during the 4 Yearly Review: (emphasis added)

[59] The 4 yearly review of modern awards required by s.156 of the FW Act is currently proceeding. The Horticulture Award and the Storage Services Award fall within shortly upcoming stages of the current review. If any party considers that the coverage or other provisions of the two awards are such that the modern awards objective in s.134 of the FW Act is not being met, the current review provides an opportunity for such an issue to be agitated before a Full Bench of the Commission.<sup>32</sup>

119. In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review, the Full Bench stated: (emphasis added)

[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (Cetin):

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In

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<sup>31</sup> *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 (21 April 2015)

<sup>32</sup> *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 (21 April 2015).

conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.<sup>33</sup>

120. With regard to the highlighted comments of the Full Bench in the above extract, the *Mitolo* proceedings were determined in a very different context to the current proceedings. The *Mitolo* case concerned an application to approve a proposed enterprise agreement. The case, at first instance and on appeal, heavily focussed upon the corporate structure of The Mitolo Group, the substantial character of The Mitolo Group's business, and the effect of this on award coverage under the Horticulture Award.
121. The statutory provisions which govern the current proceedings, including ss.156 and 160, are different to those which governed the *Mitolo* proceedings.
122. Also, the submissions and evidence that Ai Group and other employer parties have filed in the current proceedings deal with much broader issues than whether or not one enterprise agreement should be approved.
123. Accordingly, we urge the current Full Bench to consider the issues afresh rather than being unduly influenced by the decision of the Full Bench in *Mitolo*.
124. For the reasons set out in the submissions and evidence that Ai Group has filed, there are cogent reasons why the coverage provisions in the Horticulture Award should be varied as sought.
125. The Full Bench in *Mitolo* formed a view on the meaning of the wording in the existing coverage provisions in the Horticulture Award and Storage Services Award, in the context of the operations of The Mitolo Group. The Bench did not consider whether the coverage provisions should be amended to ensure consistency with the modern awards objective, or to remove ambiguity or uncertainty.

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<sup>33</sup> 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

## 7. COMPARISON OF KEY PROVISIONS OF THE HORTICULTURE AWARD AND THE STORAGE SERVICES AWARD

126. Ai Group has undertaken an analysis of the key provisions of the Horticulture Award and Storage Services Award which significantly impact upon an employer's costs and flexibility. This analysis is found in the table at **Annexure A**.

127. The Horticulture Award was drafted with the unique features of the horticulture industry in mind. The Horticulture Award includes a number of flexibilities not present in the Storage Services Award which enable horticulture businesses to deal with the seasonal nature and other key features of the industry. For example:

- The hours of work clause (clause 22.1) and shiftwork clause (clause 22.2) in the Horticulture Award set out a span of hours and shift definitions which are reflective of the nature of the horticulture industry. The span of hours is from 6am to 6pm<sup>34</sup> to allow for the picking, washing, sorting, grading, packing, forwarding and treating of fresh produce at appropriate times of the day, and to allow longer work periods during harvest time. The span of hours is much shorter in the Storage Services Award, i.e. 7.30am to 5.30pm.<sup>35</sup>
- Under the Horticulture Award, ordinary hours can be worked on Saturdays without the imposition of a weekend penalty, unlike the Storage Services Award which requires that all Saturday work must be paid at a rate of 150%.
- Clause 24.2(c) of the Horticulture Award allows for Sunday overtime to be substituted for Saturday overtime, by agreement between the employer and majority of employees affected. In such circumstances, the overtime performed on Sunday is paid as though it is a Saturday.

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<sup>34</sup> See Horticulture Award 2010, clause 22.1(b).

<sup>35</sup> See Storage Services and Wholesale Award 2010, clause 22.1.

- Clause 24.2(d) allows for work to be arranged during the harvest period to accommodate for the increase in demand for labour during that time. The clause allows for the first eight hours of overtime in a week, which includes five hours on a Sunday, to be paid at 150%.
- The Horticulture Award provides for piecework; the Storage Services award does not.

128. In addition to the abovementioned flexibilities and associated cost differentials, many other provisions of the Storage Services Award would impose significant cost increase on horticulture businesses if they were required to apply it. For example:

- When comparing minimum weekly wages alone, the Storage Services Award can be up to \$63.70 more expensive than the Horticulture Award (see **Annexure A**);
- Overtime performed on a Saturday under the Horticulture Award is paid at a rate of 150%, unlike the Storage Services Award which requires that the first two hours of overtime be paid at 150% and thereafter at 200%.
- The Horticulture Award provides for a night shift loading of 15%,<sup>36</sup> whereas the Storage Services Award provides for a night shift loading of 30%.<sup>37</sup>
- The Horticulture Award provides for a penalty of 200% for public holiday work<sup>38</sup> whereas the Storage Services Award provides for a public holiday penalty of 250%.<sup>39</sup>

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<sup>36</sup> Horticulture Award 2010, clause 22.2(d).

<sup>37</sup> Storage Services and Wholesale Award 2010, clause 25.4(c).

<sup>38</sup> Horticulture Award 2010, clause 28.3.

<sup>39</sup> Storage Services and Wholesale Award 2010, clause 24.5(c)(i).

- Overtime penalties are not payable to casual employees under the Horticulture Award.<sup>40</sup> The Storage Services Award does not exclude casuals from the payment of overtime rates.
- The Storage Services Award requires that minimum engagement periods be provided to part-time and casual employees<sup>41</sup> and for work performed on Saturdays, Sundays and public holidays.<sup>42</sup> The Horticulture Award does not include minimum engagement periods for work performed between Monday and Saturday.<sup>43</sup>

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<sup>40</sup> See Horticulture Award, clause 22.1(d).

<sup>41</sup> See Storage Services and Wholesale Award 2010, clauses 11.3(e) and 11.4(a).

<sup>42</sup> See Storage Services and Wholesale Award 2010, clause 24.5.

<sup>43</sup> See Horticulture Award, clause 24.2(e).

## 8. THE NATURE OF THE HORTICULTURE INDUSTRY

129. Australia's horticulture industry is one of the largest agricultural sectors in Australia. In 2013/2014 alone, Australian horticulture (excluding wine grapes) had a gross value of \$8.73 billion, ranked third behind the meat and grain industries.<sup>44</sup>
130. The industry operates in a highly competitive domestic and international market. It is labour intensive and mostly seasonal, and faces continuing cost pressures.
131. The witness statements of Bryan Robertson, Robin Anne Davis and Mark Cody provide valuable insight into how businesses in the horticulture industry in Australia typically operate and the cost and competitive pressures they face. These witness statements provide strong support for Ai Group's claim that the Horticulture Award is intended to, and should, apply to all activities that are part of the horticulture production chain, and which are carried out by businesses that are engaged in the raising of horticulture crops, regardless of where the activities are undertaken.

### 8.1 How horticulture enterprises operate

132. The evidence of Bryan Robertson, Robin Anne Davis and Mark Cody reveal the following regarding the operation of horticultural enterprises:
- Producing vegetables is an integrated process that typically involves a number of stages/processes including preparing the land, seeding, growing, cultivating, harvesting, washing, grading and packing for despatch.<sup>45</sup>

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<sup>44</sup> ABARES *Agricultural commodities: September quarter 2015 – Statistics*. Taken from the Department of Agriculture and Water Resources, Horticulture Fact Sheet, available at: [http://www.agriculture.gov.au/ag-farm-food/hort-policy/horticulture\\_fact\\_sheet#production-statistics](http://www.agriculture.gov.au/ag-farm-food/hort-policy/horticulture_fact_sheet#production-statistics)

<sup>45</sup> Witness statement of Bryan Robertson at paragraph 28; witness statement of Robin Anne Davis at paragraph 24 (in relation to potato production); witness statement of Mark Cody at paragraphs 12 to 21



- It is common for vegetable producers to operate across multiple properties, with one central location and secondary properties for production.<sup>46</sup> The evidence of Bryan Robertson highlights that businesses often have multiple properties because it is difficult to acquire land of the required size in one location and, consequently, as businesses expand they need to acquire land wherever they can obtain it.<sup>47</sup> In relation to potato production, the evidence of Robin Anne Davis reveals that large quantities of land are needed because potatoes are grown in rotation as they are highly susceptible to pathogens.<sup>48</sup>
- It is common for producers with multiple growing sites to have a single, centralised washing and packing facility where produce that has been grown and harvested is taken to be washed, graded and packed.<sup>49</sup> Both witness statements reveal that these facilities are highly sophisticated and expensive and that it would be nonsensical from both a financial and operational efficiency perspective to have more than one such facility.<sup>50</sup> The evidence of Bryan Robertson also shows that these washing/packing facilities typically need to be in certain, centralised locations to be able to access the required electricity, gas and water, and to ensure that the produce is able to be easily transported.<sup>51</sup>
- Vegetable and potato producers have to meet strict fitness for purpose specifications set by the government and major retailers in order to be able to sell their produce.<sup>52</sup> Washing, grading, packing and cooling their

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<sup>46</sup> Witness statement of Mark Cody at paragraphs 14 to 21

<sup>47</sup> Witness statement of Bryan Robertson at paragraph 21 and 22

<sup>48</sup> Witness statement of Robin Anne Davis at paragraph 27

<sup>49</sup> Witness statement of Bryan Robertson at paragraphs 23-24; and witness statement of Robin Anne Davis at paragraph 29

<sup>50</sup> Witness statement of Bryan Robertson at paragraph 25; and witness statement of Robin Anne Davis at paragraph 30

<sup>51</sup> Witness statement of Bryan Robertson at paragraph 25

<sup>52</sup> Witness statement of Bryan Robertson at paragraphs 28-43; and witness statement of Robin Anne Davis at paragraphs 31-38

produce in accordance with these specifications is accordingly an integral part of the horticultural production chain.

- It is common practice for horticultural businesses to have a corporate structure that consists of multiple legal entities, with there often being different entities for different functions in the business.<sup>53</sup> The main reasons for this are to ensure flexibility in managing different parts of the business and to meet structural requirements for family businesses and financial risk management requirements.

133. The evidence of Bryan Robertson also reveals that it is the industry practice for employers in the vegetable growing industry to apply the Horticulture Award to all of their operations in producing vegetables (including washing, grading and packing activities).<sup>54</sup>

134. Given the above, there can be no doubt that the Horticulture Award is the most appropriate award to apply to the functions of washing, packing, storing, grading, forwarding and treating of horticultural crops by an enterprise in the horticulture industry regardless of *where* these activities are undertaken. If washing, grading and packing activities undertaken at a different location to where the horticultural crops are grown and harvested is not covered under the Horticulture Award, the Award would be completely unaligned with how the industry operates.

135. Such an outcome would result in following:

- activities relating to the washing, packing, storing, grading, forwarding and treating of horticultural crops would be covered by the Horticulture Award if they are physically undertaken on the same farm or agricultural holding where they are grown and harvested;

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<sup>53</sup> Witness statement of Bryan Robertson at paragraphs 26-27; and witness statement of Robin Anne Davis at paragraphs 39-41

<sup>54</sup> Witness statement of Bryan Robertson at paragraphs 58-59.

- activities relating to the washing, packing, storing, grading, forwarding and treating of horticultural crops would be covered by the Storage Services Award if they are undertaken at some other location, whether that be a property immediately adjacent to where the crops are grown and harvested or a centralised facility.

136. There is no logical basis for this distinction. In light of the evidence of Robin Anne Davis, Bryan Robertson and Mark Cody it is clear that it is common practice, and indeed often a necessity, for businesses in the horticulture industry to operate centralised washing and packing facilities in locations that are different to where the crops are grown and harvested.

137. On the basis of this, the activities of washing, packing, storing, grading, forwarding and treating of horticultural crops are inherently horticultural in nature and an integral part of the horticulture production chain. They are intended to be, and should be, covered by the Horticulture Award.

## **8.2 Cost and competitive pressures on businesses in the horticultural industry**

138. The evidence of Bryan Robertson, Robin Anne Davis and Mark Cody also reveal that there are a substantial cost and competitive pressures upon businesses in the horticulture industry.<sup>55</sup> These include:

- *High input costs, including labour and energy costs relative to the return producers receive.*

Labour is a particularly big cost issue for vegetable growers, given that the delicate nature of horticultural produce commonly requires the use of labour to hand pick the vegetables, thereby restricting the industry's ability to introduce mechanised technologies as a substitute for labour (compared to other agricultural industries).

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<sup>55</sup> Witness statement of Bryan Robertson at paragraph 57; and witness statement of Robin Anne Davis at paragraphs 47-48.

- *Maintaining competitive advantage.*

Producers in the horticultural industry compete for contracts with other producers interstate and more recently overseas. The evidence of Robin Anne Davis suggests that the ability to export is a particularly big challenge for the potato industry, given the high costs of production and labour here.<sup>56</sup>

- *Dealing with variable weather conditions and market demands.*

The evidence of Bryan Robertson reveals that vegetable producers are under pressure to cope with seasonal changes in demand and supply, and unpredictable weather.<sup>57</sup>

139. Due to operating in highly competitive domestic and international markets where they have little control over produce prices, it is evident that Australian vegetable growers are under continuous pressure to manage and reduce their operating costs.
140. A recent paper by AUSVEG and Horticulture Australia Limited looked at the costs of production for Australian Vegetable Growers noted that reducing and managing total cash costs is essential for Australian vegetable growers, given the rising average total cash costs that growers have had to contend with over recent years.<sup>58</sup>
141. If labour costs increased and flexibility in managing labour decreased due to the Horticultural Award no longer applying to many aspects of horticulture businesses' operations, it is apparent that businesses in the industry would be under even more cost pressures.

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<sup>56</sup> Witness statement of Robin Anne Davis at paragraph 48

<sup>57</sup> Witness statement of Bryan Robertson at paragraphs 50-56

<sup>58</sup> AUSVEG and HAL, 'Costs of production for Australian vegetable growers' p. 2. Available at: <http://ausveg.com.au/resources/Costs%20of%20production%20for%20Australian%20vegetable%20growers.pdf>.

## 9. THE TERMS OF THE PROPOSED VARIATION

142. Ai Group proposes that the Horticulture Award be varied in the following way:

- By deleting subclause 4.2 and inserting a new subclause 4.2 as follows:

### 4.2 Horticulture industry means:

- (a) the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise; or
- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).

- By inserting a new definition of 'horticultural enterprise' in subclause 3.1 as follows:

**Horticultural enterprise** means an enterprise which as an important part of its enterprise engages in the raising of horticultural crops.

- By inserting a new definition of 'enterprise' in subclause 3.1 as follows:

**Enterprise** means a business, activity, project or undertaking, and includes:

- An employer that is engaged with others in a joint venture or common enterprise; or
  - Employers that are related bodies corporate within the meaning of section 50 of the *Corporations Act 2001*(Cth) or associated entities within the meaning of section 50AAA of the *Corporations Act 2001* (Cth).
- By deleting the definition of 'horticultural crops' in subclause 3.1 and inserting a new definition as follows:

**Horticultural crops** includes all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, or other specialised crops.

- By deleting clause 4.3(f) and inserting a new clause 4.3(f) as follows:

- (f) a broadacre mixed farming enterprise which combines the growing of crops and the management, breeding, rearing or grazing of livestock.

143. The proposed variations were developed in consultation with employers operating in the horticulture industry and they have been drafted to capture the nature of the horticulture industry and the work typically carried out within it.

### **9.1 Clause 4.2 and the definitions of “horticulture enterprise” and “enterprise”**

144. The proposed variation to the coverage of the Horticulture Award in clause 4.2 captures the functions typically performed by businesses which grow horticultural crops. These functions are widely performed by businesses in the horticulture industry and are “horticultural” in nature.

145. The proposed inclusion of a definition of “horticulture enterprise” within clause 4.2 would clarify which types of businesses are included within the coverage of the Award and which are not. The key descriptor of a “horticultural enterprise” is that it is engaged in the raising of horticultural crops.

146. The definition of “enterprise” is important. It reflects the reality that many employers in the horticulture industry have corporate structures which involve different legal entities owning/operating different parts of the business, but within a common, integrated business. Family businesses are common in the horticulture industry and many are set up in this manner, with different legal entities. As stated by Mr Bryan Robertson in his witness statement:

26. It is common for the businesses that we represent to have corporate structures that consist of different legal entities. They often have different entities for different functions of the business, for example, one for seed production, field production and harvesting, and washing, grading and packing. Some of our members also have different entities for different crops they grow.

27. The reason for structuring horticulture businesses in this way is so that the horticulture business (overall) can work out the profitability of different parts of the business. Having multiple entities is also used for tax purposes and to allow for flexibility in managing different parts of the business.

## **9.2 The definition of “horticultural crops” and the exclusion in clause 4.3(f)**

147. A recent variation to the definition of “broadacre field crops” in the Pastoral Award<sup>59</sup> had led to ambiguity and uncertainty regarding the definition of “horticulture crops” in clause 3 of the Horticulture Award, and ambiguity and uncertainty regarding the exclusion in clause 4.3(f).
148. The definition of “horticultural crops” in clause 3 of the Horticulture Award refers to the definition of “broadacre field crops” in the Pastoral Award. The change to the definition in the Pastoral Award has led to ambiguity and uncertainty in respect of the coverage of the Horticulture Award, for the reasons set out in some detail in section 11 of this submission.
149. The exclusion in clause 4.3(f) refers to the definition of “broadacre mixed farming enterprise” in the Pastoral Award, which includes the term “broadacre field crops”. Again, the change to the definition of “broadacre field crops” has led to ambiguity and uncertainty in respect of the coverage of the Pastoral Award, for the reasons set out in section 11 of this submission.
150. The changes that we have proposed to the definition of “horticultural crops” and to the exclusion in clause 4.3(f) of the Horticulture Award would remove the ambiguity and uncertainty, and hence would ensure a simpler and easier to understand modern award system, consistent with s.134(1)(g) of the modern awards objective.

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<sup>59</sup> [2015] FWCFB 8810

## 10. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

151. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).
152. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

### 10.1 A fair safety net

153. The notion of ‘fairness’ in s.134(1) is not confined in its application to employees. Consideration must also be given to the fairness or otherwise of award obligations on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a *fair* and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.<sup>60</sup>

154. Similarly, in the recent 4 Yearly Review decision concerning the payment of wages common issues proceedings, the Full Bench decided to vary a number of payment of wage provisions in particular awards on the basis that they were not “fair” to employers, and hence did not reflect the requirement in s.134 that awards provide a “fair... safety net”. For example, in its decision the Full Bench stated: (emphasis added)

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<sup>60</sup> 4 yearly review of modern awards [2015] FWCFB 3177 at [109].



[93] But we also accept that there is considerable force in the ‘impracticability’ argument advanced by ABI and Ai Group. It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter

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[181] The issue for us is whether the modern award, together with the NES, provides a fair and relevant safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[182] We have concluded that clauses 32.2 and 32.3 do not provide a ‘fair ... safety net’.<sup>61</sup>

155. Along similar lines, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the *Workplace Relations Act 1996 (WR Act)*. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

“In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. ...<sup>62</sup>

156. The uncertainty that currently exists regarding the coverage of the Horticulture Award is not fair. Businesses need to be able to plan and enter into contracts with suppliers and customers with clarity regarding what costs are payable.
157. It would also not be fair to subject employers in the horticulture industry to much higher costs and reduced flexibility by requiring them to apply the Storage Services Award to their washing, treating, packing and despatch

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<sup>61</sup> 4 Yearly review of modern awards [2016] FWCFB 8463

<sup>62</sup> *Re Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1 at [11].

operations that are integrally connected with their growing and harvesting operations. The Storage Services Award is not suited to horticultural operations from either a cost or flexibility perspective.

## 10.2 A relevant safety net

158. The changes that Ai Group is seeking to the Horticulture Award are aimed at ensuring that the award remains relevant to the horticulture industry.
159. Requiring that the Storage Services Award be applied to horticultural businesses' washing, treating, packing and despatch operations would result in the award not being "relevant" to the manner in which the horticulture industry operates. These operations are integrally connected with growing and harvesting operations.
160. The Storage Services Award is not relevant to the operations of businesses which grow horticultural crops. It is an award designed for large warehousing and distribution operations, like those commonly found in large metropolitan areas.

## 10.3 Section 134(1)(a) to (h)

### Section 134(1)(a) - Relative living standards and needs of the low paid

161. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a): (emphasis added)

[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.<sup>63</sup>

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<sup>63</sup> *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

162. The term “low paid” has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.<sup>64</sup>

163. The variations proposed by Ai Group do not detract from the maintenance of the relative living standards and needs of the low paid. They are aimed at protecting employers from unwarranted cost increases and reductions in flexibility. Given the cost pressures that horticultural businesses are already under, further cost pressures could result in a loss of jobs and/or a reduction in hours for employees, thereby resulting in a reduction of living standards for those employees.
164. Examples would include part-time and full-time employees engaged to work during harvest period in cleaning, treating, packing and despatching products. These employees often have the opportunity to work overtime and earn a 150% rate for the first eight hours of overtime worked in a week (including five hours on a Sunday).<sup>65</sup> If this flexibility is no longer available because the Storage Services Award is held to cover the work performed (rather than the Horticulture Award), many employees may lose the opportunity to earn overtime because their employers could not afford the much higher overtime penalties in the Storage Services Award.

### **Section 134(1)(b) - The need to encourage collective bargaining**

165. We do not anticipate that the variations proposed, if made, would undermine s.134(1)(b).

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<sup>64</sup> *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

<sup>65</sup> Horticulture Award, clause 24.2.

166. In fact, clarifying the coverage of the Horticulture Award would assist the parties to more efficiently and effectively bargain. The present uncertainties are impeding bargaining because of uncertainties surrounding award coverage and the consequential impact on the Better Off Overall Test.<sup>66</sup>

**Section 134(1)(c) - The need to promote social inclusion through increased workforce participation**

167. The flexibility offered by Horticulture Award encourages horticulture industry employers to increase workforce participation by enabling the employer to offer additional hours and employ new employees, particularly during harvest periods.
168. This includes the flexibility provided for under the Horticulture Award regarding forms of employment (e.g. piecework) and hours of work (e.g. a 6am to 6pm spread of hours, with the ability to work 12 ordinary hours per day).
169. The Storage Services Award is not suited to the horticulture industry. If horticulture businesses were forced to apply it because of an excessively narrow coverage for the Horticulture Award, there would be negative impacts upon workforce participation, due to the inflexible forms of employment, the inflexible hours of work arrangements, and the excessive penalty rates provided for in the Storage Services Award

**Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work**

170. The Horticulture Award contains relatively flexible terms and conditions that suit the features of the horticulture industry.
171. Ai Group’s proposed variation is aimed at ensuring that the Horticultural Award continues to cover the operations of businesses which grow horticultural crops, including integral cleaning, treating, packing and despatch functions.

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<sup>66</sup> See sections 186 and 193 of the Fair Work Act 2009.

172. The flexibilities provided to employers and employees, especially during harvest periods, under the Horticulture Award are clearly an acknowledgement by the Award Modernisation Full Bench of the unique needs of the industry. This factor was also acknowledged by then Deputy Prime Minister, the Hon Julia Gillard MP, when the Award Modernisation Request was amended to ensure that the existing flexibilities in the industry were preserved (as discussed in section 3 of this submission).

**Section 134(1)(da) - The need to provide additional remuneration**

173. This is a neutral consideration in this matter.

**Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value**

174. This is a neutral consideration in this matter.

**Section 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden**

175. As set out in this submission and in the witness statements that have been filed, there would be a very significant increase in labour costs and loss of productivity if the Horticulture Award no longer applied to the washing, treating, packaging and despatch operation of businesses which grow horticultural crops.

176. The proposed variation would avoid this adverse outcome.

**Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards**

177. Our proposed variation would ensure that the Award is simple and easy to understand. The proposed provisions are clear and unambiguous. We cannot foresee any consequence arising from our claim that would undermine s.134(1)(g).

178. The outcome in the *Mitolo* case has created significant uncertainty among horticulture industry employers regarding award coverage, and this uncertainty needs to be addressed, by preserving the manner in which the Horticulture Award is very commonly applied in the horticulture industry.
179. The proposed variation would also remove the uncertainty which has arisen as a result of the recent variation to the definition of “broadacre field crop” in the Pastoral Award, a definition which is referred to in the coverage clause of the Horticulture Award.

**Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

180. To the extent that the proposed amendments are consistent with s.134(1)(b), (d), (f) and (g), they would also have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
181. The horticulture industry is a significant contributor to employment, economic growth and export performance, as highlighted in this submission and the witness statements that we have filed.
182. It is important that the horticulture industry is able to continue to remain competitive both domestically and internationally. Access to reasonable labour costs, and an ability for horticulture businesses to arrange work in a way which enables them to respond to changes in demand, such as during harvest periods, are important features of the industry. These features are reflected in the provisions of the Horticulture Award. If horticulture businesses are forced to apply the Storage Services Award to parts of their workforce, due to an overly narrow coverage of the Horticulture Award, the horticulture industry will be less profitable, less productive, less sustainable, less competitive, and less able to maintain or increase employment levels.

## **Conclusion**

183. In summary, the specific factors comprising the modern awards objective weigh strongly in favour of granting the proposed variation.

## 11. APPLICATION UNDER SECTION 160

184. The following section of this submission is made in support of the joint application of Ai Group and The Mitolo Group under s.160 of the FW Act to amend clause 4 and the definition of “horticultural crops” in clause 3 of the Horticulture Award to remove ambiguity and uncertainty.
185. This section should be read in conjunction with other sections of this submission because many of the arguments in support of varying the Award to ensure consistency with the modern awards objective, are relevant to the merits of varying the Award to remove ambiguity and uncertainty.
186. Ai Group has standing to make the application as an organisation that is entitled to represent the industrial interests of one or more employers who are covered by the Horticulture Award (s.160(2)(c)).
187. In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Full Bench made the following relevant comments about s.160 in the context of the Review: (emphasis added)
- [51] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Commission may vary a modern award to “remove an ambiguity or uncertainty or to correct an error”. These provisions continue to be available during the Review, either on application or on the Commission’s own initiative.
- [52] In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties will be provided with an opportunity to comment on any such proposed variation.
188. Clause 4 and the definition of “horticultural crops” in clause 3 of the Award are both ambiguous and uncertain, and this ambiguity and uncertainty should be addressed through the variation that Ai Group has proposed.
189. The key authority setting out the appropriate approach for the Commission to take when exercising jurisdiction to vary an industrial instrument on the basis of ambiguity or uncertainty is the decision of the Full Bench of the AIRC in *Re*.



*Tenix Defence Pty Limited*.<sup>67</sup> In this case, the Full Bench said: (emphasis added)

[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:

"The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.

[32] Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. In exercising such a discretion the Commission is to have regard to the mutual intention of the parties at the time the agreement was made.

190. The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*<sup>68</sup> provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':

'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'

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<sup>67</sup> *Re Tenix Defence Pty Limited* (PR917548, 9 May 2002, as cited in [2012] FWA FB 3210 and [2010] FWA 8732.

<sup>68</sup> T3721, 24 November 2000

191. Ai Group’s application meets the relevant jurisdictional arguments.
192. Clause 4 of the Horticulture Award is both ambiguous and uncertain, and this ambiguity and uncertainty should be addressed through the variation that Ai Group has proposed.
193. The specific provisions which are ambiguous and uncertain are:
- Clause 4.2(a);
  - The definition of “horticultural crops” in clause 3; and
  - Clause 4.3(f).

### **11.1 Clause 4.2(a)**

194. Clause 4.2(a) is ambiguous and uncertain.
195. Ai Group contends that this clause does not require that treating, sorting, grading, packing and despatch activities are carried out at the same location as the growing of the horticultural crops. The reasons for Ai Group’s view have been set out in detail in earlier sections of this submission. We understand that the NUW has an opposing view. Accordingly, there are “*rival contentions advanced*” and “*an arguable case*” has been “*made out for more than one contention*”. In such circumstances, the Commission should “*err on the side of finding an ambiguity or uncertainty*”.<sup>69</sup>
196. The Full Bench can have no doubt that clause 4.2(a) meets the test of uncertainty articulated by Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*.<sup>70</sup> It is very obvious that clause 4.2(a) is in a “*state of not being definitely known or perfectly clear, doubtfulness or vagueness*”.

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<sup>69</sup> *Re. Tenix Defence Pty Limited* (PR917548, 9 May 2002), at para [31].

<sup>70</sup> T3721, 24 November 2000

197. After finding that clause 4.2(a) is ambiguous and/or uncertain, the Commission has the jurisdiction to remedy the situation by varying the Award under s.160 of the Act.
198. It is in the public interest that the Award be varied in the manner proposed by Ai Group, for the reasons set out in detail in earlier sections of this submission.

## 11.2 The definition of “horticultural crops” in clause 3

199. “Horticultural crops” are currently defined in clause 3 in the following manner:

**horticultural crops** includes all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, or other specialised crops unless they are specifically named as a **broadacre field crop** in the *Pastoral Award 2010*.

200. This definition was not problematic until a variation was made to the definition of “broadacre field crop” in the Pastoral Award in December 2015,<sup>71</sup> as sought by the NFF.

201. Prior to that variation, the definition of “broadacre field crop” in the Pastoral Award stated:

**broadacre field crops** means canola, wheat, hay, barley, oats, rice, triticale, maize, millet, chickpeas, cotton, faba beans, lucerne, lupins, pigeon peas, sorghum, soybean, sunflower, and other crops grown as part of a broadacre mixed farming enterprise

202. It can be seen that the old definition identified a list of specific crops.

203. The variation to the definition of “broadacre field crops” in the Pastoral Award in December 2015 replaced the above definition with the following definition, which replaced the list of specific crops with broad categories of crops:

**broadacre field crops** means grains, seeds, grasses, silage, legumes, fibre, flowers, ~~canola, wheat, hay, barley, oats, rice, triticale, maize, millet, chickpeas, cotton, faba beans, lucerne, lupins, pigeon peas, sorghum, soybean, sunflower,~~ and other crops grown as part of a broadacre mixed farming enterprise

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<sup>71</sup> [2015] FWCFB 8810.

204. There is no mention in the December 2015 Decision or in the NFF's submissions of the Horticulture Award or any intent to disturb the coverage of the Horticulture Award. In fact it was emphasised by the NFF that the variation to the definition was not intended to alter the coverage of the Pastoral Award.<sup>72</sup> The AWU did not object to the NFF's application.<sup>73</sup>
205. The Pastoral Award decision has created ambiguity and uncertainty regarding the coverage of the Horticulture Award because many of the broad categories of crops listed in the definition of "broadacre field crops" include common horticulture crops. For example, peas and beans are horticulture crops, but they are legumes which is a broad category of crop now referred to in the definition of "broadacre field crops" in the Pastoral Award.
206. On one interpretation, the definition of "horticultural crops" under the Horticulture Award has not been adversely affected because the definition only excludes crops that are "specifically named as a **broadacre field crop** in the *Pastoral Award 2010*". Arguably, there are no longer any specifically named crops in the definition of "*broadacre field crops*" in the Pastoral Award; just broad categories of crops.
207. Also, on one interpretation, the definition of "horticultural crops" under the Horticulture Award has not been adversely affected because the definition of "broadacre field crop in the Pastoral Award only includes "*crops grown as part of a broadacre mixed farming enterprise*". This raises the issue of what a "broadacre mixed farming enterprise" is.
208. In considering this issue, it is worthwhile to consider the meaning of a "mixed farming enterprise", given that a broadacre mixed farming enterprise is a type of mixed farming enterprise.

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<sup>72</sup> Transcript, 4 yearly review of modern awards—Pastoral Award 2010, 9 December 2015, at PN 103, [https://www.fwc.gov.au/documents/documents/transcripts/20151209\\_am2014239.htm](https://www.fwc.gov.au/documents/documents/transcripts/20151209_am2014239.htm)

<sup>73</sup> Transcript, 4 yearly review of modern awards—Pastoral Award 2010, 9 December 2015, at PN 122 [https://www.fwc.gov.au/documents/documents/transcripts/20151209\\_am2014239.htm](https://www.fwc.gov.au/documents/documents/transcripts/20151209_am2014239.htm)

209. A “mixed farming enterprise” is commonly understood to mean one where crops are grown and livestock are raised.

210. The *Oxford Dictionary* defines “mixed farming” as:

“a system of farming which involves the growing of crops as well as the raising of livestock.”

211. The *Macquarie Dictionary* defines “mixed farming” as:

**mixed farming:** *noun* combined agriculture and pastoral farming.

212. As stated by McGuckian, National Social Research Project, RMCG:<sup>74</sup> (emphasis added)

“Australian farming is in the main a mixed farming system. There is usually a mixture of livestock and cropping enterprises, which are generally managed by the same farming family. These enterprises often, but don’t always, utilise the same land in any one year. The enterprises will often complement each other, but again this is not always the case. This farming system has come about because Australian soils are of ‘mixed’ quality and farmers are good at managing risk. Some soils are good enough to grow crops continuously, some soils can grow crops in some years. When soils are not growing crops, they can be growing pastures with grazing animals. The proportion of the farm growing crops and livestock will depend on a range of factors including soil types, enterprise profitability, and farmer preference.

213. It is not problematic to exclude genuine broadacre mixed farming enterprises from the Horticulture Award, because horticulture businesses do not typically raise livestock. No doubt this is the reason why the exclusion in the definition of “horticultural crops” in clause 3 and the exclusion in clause 4.3(f) in the Horticulture Award, as sought by the NFF, attracted little attention during the award modernisation process.

214. However, the definition of “broadacre mixed farming enterprise” in the Pastoral Award is ambiguous and unclear, and consequently does not provide an appropriate basis for determining the boundaries of the coverage of the Horticulture Award. The definition is:

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<sup>74</sup> *Australian Mixed farming – A system under threat?* Nigel McGuckian, National Social Research Project, RMCG, Discussion Paper 1/2006. Available at: [www.rmcp.com.au/media/Publications and Papers/Discussions Papers](http://www.rmcp.com.au/media/Publications%20and%20Papers/Discussions%20Papers)

**broadacre mixed farming enterprise:**

- means a farming enterprise consisting of the growing of broadacre field crops as defined;
- includes the rearing, management, and grazing of livestock;
- means a farming enterprise which combines both; or
- means a farming enterprise which in addition to any of the above grows other crops, for the purposes of crop rotation or the rearing, management, and grazing of livestock as part of a mixed farming enterprise.

215. The above definition in the Pastoral Award would be adequate if the words clearly specified that the first three dot points were all mandatory, but this is not clear. On one interpretation, the definition extends far beyond the commonly understood meaning of a mixed farming enterprise. If a farming enterprise could be considered a “broadacre mixed farming enterprise” simply because it meets the requirements in dot point one (i.e. it grows broadacre crops), the widely understood coverage of the Horticulture Award could be very substantially disturbed.

216. To remove ambiguity and uncertainty in the Horticulture Award, given the recent variation to the Pastoral Award, the definition of “horticultural crops” in clause 3 of the Horticulture Award should be varied as follows:

**horticultural crops** includes all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, or other specialised crops. ~~unless they are specifically named as a broadacre field crop in the Pastoral Award 2010.~~

217. After finding that the definition of “horticulture crops” is ambiguous and/or uncertain, the Commission has the jurisdiction to remedy the situation by varying the definition under s.160 of the Act.

218. It is in the public interest that the Award be varied in the manner proposed by Ai Group, for the above reasons.

### 11.3 Clause 4.3(f)

219. Clause 4.3(f) of the Horticulture Award states:

4.3 Horticulture industry **does not mean:**

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(f) a broadacre mixed farming enterprise as defined in the *Pastoral Award 2010*.

220. As discussed above, the definition of “broadacre mixed farming enterprise” in the Pastoral Award is ambiguous and unclear, and consequently does not provide an appropriate basis for determining the boundaries of the coverage of the Horticulture Award.

221. Accordingly, clause 4.3(f) should be amended to remove ambiguity and uncertainty, and to clarify the intent of the provision:

(f) a broadacre mixed farming enterprise ~~as defined in the *Pastoral Award 2010*~~ which combines the growing of crops and the management, breeding, rearing or grazing of livestock.

### 11.4 Operative date

222. Ai Group seeks a retrospective operative date of 1 January 2010, i.e. the date when the Horticulture Award was made.

223. Exceptional circumstances exist in order to justify granting the proposed retrospective operative date.

224. In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Full Bench made the following relevant comments about s.160 in the context of the Review: (emphasis added)

[57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the ‘specified day’). The default position is that the ‘specified day’ must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee’s first full pay period on or after the ‘specified day’. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive ‘and’ in s.165(2) that a variation can only operate retrospectively if the variation is made

under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

225. The circumstances surrounding this matter can be aligned with those dealt with by Justice Boulton in respect of a variation proposed by Ai Group to the coverage clause of the *Black Coal Mining Industry Award 2010* during the 2 Year Review of Awards. In His Honour's decision, Boulton J stated:<sup>75</sup> (emphasis added)

[12] The Ai Group submit that the amendment to the note in the coverage clause should have a retrospective operative date of 1 January 2010. The Ai Group submit that this would avoid any uncertainty about the coverage of the Award for the period since 1 January 2010, and avoid uncertainty about the coverage of the portable long service leave legislation, which is based upon the coverage of the Award as at 1 January 2010.

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[18] I am satisfied that there are exceptional circumstances that make it appropriate for the variation to the note at clause 4.3 of the Award to operate retrospectively as sought by the Ai Group.

226. Similar to the above matter, a retrospective operative date of 1 January 2010 for the variation to the Horticulture Award proposed by Ai Group would “*avoid any uncertainty about the coverage of the Award for the period since 1 January 2010*”.

227. The circumstances surrounding Ai Group's current application can also be aligned with those dealt with by Vice President Lawler in respect of an application made by Ai Group under ss.157 and 160 to vary the *Telecommunications Services Award 2010* to include the National Training Wage Schedule. In His Honour's decision, Vice President Lawler stated: (emphasis added)

[4] I accept the submission of Mr Smith for AiG that there are employers in the industry who have engaged trainees in accordance with the provisions of the National Training Wage Award in the period since 1 January 2010 and it is necessary to give the variation a retrospective operation to 1 January 2010 as a reasonable protection for those employers. However, I am concerned that the retrospective variation should not be used as a basis for any employer making a claim for restitution of an overpayment of wages where a 'trainee' was employed in a substantive classification under the Award and received wages and other wage related payments in excess of those due under the National Training Wage schedule in the period between 1

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<sup>75</sup> 2 Year Review of Awards – *Black Coal Mining Industry Award 2010*, [2012] FWA 9606



January 2010 and the date the variation determination was made. Such employees should not be obliged to repay wages and other wage related payments solely because the present variation has a retrospective effect (of course, an employer should be free to pursue the recovery of overpayments arising for other reasons). I have included an additional paragraph 14.4(b) designed to achieve that outcome. None of the 'parties' that appeared raised any objection to the wording of clause 14.4(b)

228. The intent of the provision referred to in the second half of the above extract was to avoid any employer demanding that an employee repay any wages that the employee had already received prior to the date when the award was varied, solely because the variation had a retrospective effect.
229. Similar to the above matter, there are employers in the relevant industry who have applied particular award conditions (namely, the Horticulture Award conditions) *"in the period since 1 January 2010 and it is necessary to give the variation a retrospective operation to 1 January 2010 as a reasonable protection for those employers"*.
230. The following two AIRC cases in which Ai Group was involved also highlight relevant circumstances which justified granting retrospective operative dates for award variations:
- In *National Engineering Pty Ltd v AMWU*,<sup>76</sup> a Full Bench of the AIRC varied the *Metal, Engineering and Associated Industries Award 1998*, as it related to National Engineering Pty Ltd, 8 years retrospectively to prevent the AMWU and its members pursuing a claim that the company had underpaid shift penalties, when the union and employees had accepted the shift penalty arrangements for the 8 year period. The Full Bench said: (emphasis added)

"[75] We are satisfied that equity will be better served by a determination to preserve the arrangement for the period over which it operated than by a determination that would in effect set it aside. If there may be some unfairness in an effective refusal to allow employees to claim their strict Award entitlement, it is offset by our finding that on a balanced view, the arrangement implements, through an agreement of a kind ostensibly enabled by the then award, a flexible work practice proposed by the employees themselves. The workforce was organised. The arrangement was sanctioned by union officials

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<sup>76</sup> PR912582, Munro J, Duncan SDP and Cargill C, 17 December 2001

at various stages throughout its term of operation. In the circumstances current award rights should be adjusted to give effect to and ratify the informal but perhaps technically invalid agreement.”

- In *Mitsubishi Motors Australia Limited and Others*,<sup>77</sup> a Full Bench of the Commission varied several awards for a number of years retrospectively to prevent the AMWU and the CEPU and their members benefitting from a new interpretation of the public holiday provisions of the awards, when a different interpretation had been applied throughout the vehicle industry for many years. The Full Bench said: (emphasis added)

“[42] We are satisfied that the circumstances of the case are sufficiently rare and singular to justify a conclusion that they are exceptional for purpose of section 146. The main grounds of employers’ applications have been made out...The submissions of the AiG point to the desirability of acting to ensure that the scope of the award provision is consistent with the industry standard as it has been understood since at least 1952.”

231. Similar to the above matters, *“equity is better served”* in the current proceedings by granting the retrospective operative date that Ai Group has proposed. Also, the Commission should act *“to ensure that the scope of the award provision is consistent with the industry standard”*.
232. Accordingly, exceptional circumstances exist justifying an operative date of 1 January 2010 for the variation to the Horticulture Award.

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<sup>77</sup> Print T1300, Munro J, Harrison SDP and Foggo C, 3 October 2000

## **12. CONCLUSION**

233. For the above reasons, Ai Group's proposed variation:

- Meets all of the statutory requirements, including those under ss.134, 138, 156 and 160; and
- Has obvious and substantial merit.

234. Accordingly, we urge the Full Bench to vary the Horticulture Award as sought, with a retrospective operative date of 1 January 2010.

**HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS**

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
<p><b>Types of employment</b></p>	<p><b>10.1 General</b></p> <p>Employees under this award will be employed in one of the following categories:</p> <p>(a) full-time employees;</p> <p>(b) part-time employees; or</p> <p>(c) casual employees.</p> <p>At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual.</p> <p><b>10.2 Full-time employment</b></p> <p>A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.</p> <p><b>10.3 Part-time employment</b></p> <p>(a) A part-time employee is an employee who:</p> <p>(i) is engaged to work an average of fewer than 38 ordinary hours per week; and</p> <p>(ii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.</p> <p>(b) For each ordinary hour worked, a part-time employee will be paid no less than 1/38th of the minimum weekly rate of pay for the relevant classification in clause 14—Minimum wages.</p> <p><u>(c) An employer must inform a part-time employee of their ordinary hours of work and starting and finishing times.</u></p> <p>(d) All time worked in excess of the hours mutually arranged will be overtime and paid for at the appropriate overtime rate.</p> <p><b>10.4 Casual employment</b></p> <p>(a) A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.</p>	<p><b>11.1 Engagement of employees</b></p> <p>An employee is to be engaged as a full-time, a regular part-time, or a casual employee.</p> <p><b>11.2 Full-time employment</b></p> <p>A full-time employee is one engaged and paid by the week.</p> <p><b>11.3 Part-time employment</b></p> <p>(a) An employer may employ part-time employees in any classification in this award.</p> <p>(b) A part-time employee is an employee who:</p> <p>(i) works fewer than full-time hours of 38 per week;</p> <p><u>(ii) has reasonably predictable hours of work; and</u></p> <p>(iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.</p> <p><u>(c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.</u></p> <p><u>(d) Any agreed variation to the regular pattern of work will be recorded in writing.</u></p> <p><u>(e) An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.</u></p> <p>(f) All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 24—Overtime and penalty rates.</p> <p>(g) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.</p> <p>(h) Commencement of part-time work and return from part-time to full-time work will not break the continuity of service or</p>	<p>The Horticulture Award and Storage Services Award both enable the engagement of full-time, part-time and casual employees.</p> <p>The key differences between the awards in regard to the engagement of employees are set out below:</p> <ul style="list-style-type: none"> <li>• The Storage Services Award sets out a more prescriptive process than the Horticulture Award for engaging employees.</li> <li>• The Storage Services Award requires that part-time employees be provided reasonably predictable hours of work. This obligation does not exist under the Horticulture Award.</li> <li>• The Storage Services Award sets out minimum engagement periods of three hours and four hours for part-time and casual employees respectively. The Horticulture Award does not contain minimum engagement periods (except with respect to overtime worked on a Sunday in clause 24.2 of the Horticulture Award).</li> <li>• The Horticulture Award specifies that the casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment under the award. This means that the casual loading is not cumulative with respect to other benefits provided to full-time and part-time employees. No such term exists in the Storage Services Award.</li> </ul>

**HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS**

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis																																		
	<p>(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for an employee in that classification in clause 14—Minimum wages, plus a casual loading of 25%.</p> <p><u>(c) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment provided for in this award.</u></p>	<p>employment.</p> <p>(i) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 11.4.</p> <p><b>11.4 Casual employment</b></p> <p>(a) A casual employee is one engaged and paid as such and <u>will be guaranteed not less than four hours' engagement every start.</u></p> <p>(b) Casual work will be paid for at the ordinary wage rate with an addition of 25%.</p>																																			
<p><b>Minimum wages</b></p>	<p><b>14.1 Adult employee minimum wages</b></p> <p>(a) The classifications and minimum wages for an adult employee are set out in the following table:</p> <table border="1" data-bbox="259 772 931 1315"> <thead> <tr> <th><sup>1</sup>Classification</th> <th>Minimum weekly wage \$</th> </tr> </thead> <tbody> <tr> <td>Level 1</td> <td><u>672.70</u></td> </tr> <tr> <td>Level 2</td> <td>692.10</td> </tr> <tr> <td>Level 3</td> <td>712.00</td> </tr> <tr> <td>Level 4</td> <td>738.90</td> </tr> <tr> <td>Level 5</td> <td><u>783.30</u></td> </tr> </tbody> </table> <p>(b) For the purposes of clause <u>14.1(a)</u>, any entitlement to a</p>	<sup>1</sup> Classification	Minimum weekly wage \$	Level 1	<u>672.70</u>	Level 2	692.10	Level 3	712.00	Level 4	738.90	Level 5	<u>783.30</u>	<p><b>15.1 Minimum wage rates</b></p> <p>The minimum wage rates of pay for a full-time adult employee are set out below:</p> <table border="1" data-bbox="954 772 1648 1315"> <thead> <tr> <th>Classification</th> <th>Minimum weekly rate \$</th> </tr> </thead> <tbody> <tr> <td>Storeworker grade 1</td> <td></td> </tr> <tr> <td>On commencement</td> <td>718.60</td> </tr> <tr> <td>After 3 months</td> <td>727.70</td> </tr> <tr> <td>After 12 months</td> <td><u>736.40</u></td> </tr> <tr> <td>Storeworker grade 2</td> <td>743.20</td> </tr> </tbody> </table>	Classification	Minimum weekly rate \$	Storeworker grade 1		On commencement	718.60	After 3 months	727.70	After 12 months	<u>736.40</u>	Storeworker grade 2	743.20	<p>The minimum wage rates at all levels/grades vary significantly between the Horticulture Award and Storage Services Award.</p> <p>The difference in terms of monetary value is set out in the table below:</p> <table border="1" data-bbox="1693 799 2168 1305"> <thead> <tr> <th>Level/grade</th> <th>Monetary weekly difference \$</th> </tr> </thead> <tbody> <tr> <td></td> <td><b>(Storage Services Award +)</b></td> </tr> <tr> <td>Level/grade 1 (after 12 months)</td> <td>63.70</td> </tr> <tr> <td>Level/grade 2</td> <td>51.10</td> </tr> <tr> <td>Level/grade 3</td> <td>53.10</td> </tr> </tbody> </table>	Level/grade	Monetary weekly difference \$		<b>(Storage Services Award +)</b>	Level/grade 1 (after 12 months)	63.70	Level/grade 2	51.10	Level/grade 3	53.10
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**HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS**

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<p><b>Piecework</b></p>	<p>15.1 An employer and a full-time, part-time or casual employee may enter into an agreement for the employee to be paid a piecework rate. An employee on a piecework rate is a pieceworker.</p> <p>15.2 The piecework rate fixed by agreement between the employer and the employee must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee. The piecework rate agreed is to be paid for all work performed</p>	<p>None</p>	<p>The Horticulture Award enables a full-time, part-time or casual employee to be engaged on a piece rate arrangement. This form of payment is reflective of the work performed in the horticulture industry.</p> <p>The Storage Services Award does not enable piece rates to be paid.</p>																						

HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
	<p>in accordance with the piecework agreement.</p> <p>15.3 The calculation of piecework rates in clause 15.2 for casual employees will include the casual loading prescribed in clause 10.4(b).</p> <p>15.4 An agreed piecework rate is paid instead of the minimum wages specified in clause 14—Minimum wages.</p> <p>15.5 The following clauses of this award do not apply to an employee on a piecework rate:</p> <p>(a) Clause 22—Ordinary hours of work and rostering;</p> <p>(b) Clause 24—Overtime; and</p> <p>(c) Clause 24.3—Meal allowance.</p> <p>15.6 The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress.</p> <p>15.7 The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee.</p> <p>15.8 The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.</p> <p>15.9 Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly or hourly wage in this award for the type of employment and the classification level of the employee, as the employee's earnings are contingent on their productivity.</p> <p>15.10 For the purposes of the NES:</p> <p>(a) The base rate of pay for a pieceworker is the base rate of pay as defined in the NES.</p> <p>(b) The full rate of pay for a pieceworker is the full rate of pay as defined in the NES.</p>		

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<td>First aid allowance<sup>3</sup></td> <td><a href="#">17.1(d)</a></td> <td>51</td> <td>9.29</td> </tr> </tbody> </table> <p><sup>1, 2, 3</sup> These allowances apply for all purposes of this award</p> <p><u>Expense-related allowances:</u></p> <p>The expense-related allowances in this award will be adjusted by reference to the Consumer Price Index (CPI) as per the following:</p> <table border="1"> <thead> <tr> <th>Allowance</th> <th>Clause</th> <th>Applicable CPI figure</th> <th>\$</th> </tr> </thead> <tbody> <tr> <td>Meal allowance—more than two hours' overtime after ordinary ceasing time without a day's notification</td> <td><a href="#">24.3</a></td> <td>Take away and fast foods sub-group</td> <td>12.05 per meal</td> </tr> </tbody> </table> <p><sup>2</sup></p>	Allowance	Clause	% of standard rate \$18.21	\$ per week unless stated otherwise	Leading hand allowance <sup>1</sup> :	<a href="#">17.1(a)</a>			2 to 6 employees		115	20.94	7 to 10 employees		134	24.40	11 to 20 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For example, see the first aid allowance and meal allowance.</p>
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<p><b>Hours of work</b></p>	<p><b>22.1</b> The <u>ordinary hours of work for all full-time and part-time employees</u> other than shiftworkers will not exceed 152 hours over a four week period provided that:</p> <p><b>(a)</b> The ordinary hours will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.</p>	<p><b>22.1 Ordinary hours of work—day workers</b></p> <p><b>(a)</b> The ordinary hours of work will be an average of 38 hours per week Monday to Friday inclusive, spread over a period of four weeks.</p> <p><b>(b)</b> <u>The ordinary hours will be worked on four or five days of not more than eight hours (Monday to Friday inclusive)</u> each continuously, except for meal breaks, at the discretion of the employer.</p>	<p>The Horticulture Award and Storage Services Award prescribe different processes for arranging ordinary hours. Key differences are set out below:</p> <ul style="list-style-type: none"> <li>The Horticulture Award specifies that the ordinary hours of work provisions in clause 22 apply only to full-time and part-time employees.</li> </ul>																																																																												

<sup>2</sup> Monetary amounts of work-related allowances taken from the corresponding Allowances Sheet to the Horticulture Award (as at 1 July 2016). See [https://www.fwc.gov.au/documents/documents/modern\\_awards/allowances/ma000028-all.pdf](https://www.fwc.gov.au/documents/documents/modern_awards/allowances/ma000028-all.pdf)

<sup>3</sup> Monetary amounts of work-related allowances taken from the corresponding Allowances Sheet to the Storage Services and Wholesale Award 2010 (as at 1 July 2016). See [https://www.fwc.gov.au/documents/documents/modern\\_awards/allowances/ma000084-all.pdf](https://www.fwc.gov.au/documents/documents/modern_awards/allowances/ma000084-all.pdf)



HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
	<p><b>(b)</b> <u>The ordinary hours will be worked between 6.00 am and 6.00 pm</u> except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.</p> <p><b>(c)</b> <u>The ordinary hours will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.</u></p> <p><b>(d)</b> <u>All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime.</u></p>	<p><b>(c)</b> <u>An employee may work up to 10 ordinary hours in a day, subject to agreement between the employer and the majority of employees concerned or between the employee and the employer.</u></p> <p><b>(d)</b> The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees concerned or between the employee and the employer.</p> <p><b>(e)</b> The method of implementation of ordinary hours as specified in this award over a period of four weeks may be by employees working less than eight ordinary hours on one or more days a week or by rostering employees off on days of the week during a particular work cycle so that each employee has one day off during that work cycle.</p> <p><b>22.2 Spread of hours</b></p> <p><b>(a)</b> <u>Ordinary hours will be worked between 7.00 am and 5.30 pm.</u></p> <p><b>(b)</b> The spread of hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or between the employee and the employer.</p> <p><b>22.3 Changing ordinary hours of work</b></p> <p>An employer will not alter the starting and finishing times in any establishment without giving one week's notice.</p>	<ul style="list-style-type: none"> <li>• The spread of ordinary hours under the Horticulture Award is between 6am and 6pm. The Storage Services Award specifies a shorter spread of ordinary hours (between 7am and 5.30pm).</li> <li>• The Horticulture Award allows ordinary hours to be arranged up to 12 hours on any day. The Storage Services Award limits this to 10 hours a day.</li> <li>• The Horticulture Award limits the payment of overtime to employees working in excess of the ordinary hours to full-time and part-time employees only.</li> </ul>
<p><b>Shiftwork</b></p>	<p>22.2 The ordinary hours of work for a shiftworker will not exceed 152 hours over a four week period provided that:</p> <p>(a) The ordinary hours will be worked between Monday and Friday inclusive.</p> <p>(b) For the purposes of this award:</p> <p>(i) <b>afternoon shift</b> means any shift finishing after 6.00 pm and at or before midnight; and</p> <p>(ii) <b>night shift</b> means any shift <u>finishing after midnight and at or before 8.00 am.</u></p>	<p><b>25.1 Definitions</b></p> <p>(a) <b>Early morning shift</b> means a <u>shift commencing between 2.00 am and 7.00 am.</u></p> <p>(b) <b>Afternoon shift</b> means a shift finishing after 6.00 pm and at or before midnight.</p> <p>(c) <b>Night shift</b> means a shift <u>finishing after midnight and at or before 8.30 am.</u></p> <p>(d) By agreement between the employer and the majority of employees in the workplace or a section or sections of it, the</p>	<p>Key differences between the shift provisions under the Horticulture Award and Storage Services Award are set out below:</p> <ul style="list-style-type: none"> <li>• The awards have a different definition of night shift.</li> <li>• The Storage Services Award provides for an early morning shift, including a shift commencing at 6am which would be day work under the Horticulture Award</li> <li>• The Horticulture Award prescribes a shift</li> </ul>

HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
	<p>(c) If an employee is directed to work on shifts the shift must not exceed eight hours without the payment of overtime.</p> <p>(d) <u>Shiftworkers whilst on afternoon and night shifts will be paid 15% more than the ordinary rates for such shifts.</u></p> <p>(e) Where shiftwork is adopted, shifts will, as far as practicable, rotate regularly where two shifts are worked one will be regarded as day shift and the second the afternoon or night shift. Where three shifts are worked they will be divided into day, afternoon and night shifts.</p> <p>(f) The employer has the right to decide before the commencement of such shiftwork which of the shifts will be the day shift and will notify each employee accordingly.</p> <p>(g) The employer will keep a roster at the workplace that specifies the times which each shift will commence and finish and which shifts are deemed to be day shift.</p> <p>(h) All time worked in excess of the ordinary hours will be deemed overtime.</p>	<p>span of hours over which afternoon shift may be worked may be altered by up to one hour at either end of the span.</p> <p><b>25.2 No requirement to work shift</b></p> <p><u>Employees employed as day shift employees must not be required to work afternoon shift in the absence of the employee's specific agreement.</u> Afternoon shift will be worked by the employees engaged specifically for this purpose, or by volunteers from day shift. Employees must not be discriminated against in any way for not volunteering to work a particular shift.</p> <p><b>25.3 Hours of work</b></p> <p>(a) The ordinary hours of work of shiftworkers will average 38 per week as provided in clause 22.1 and must not exceed 152 in any work cycle; and</p> <p>(b) except as provided in clause 25.3(c) will not exceed:</p> <ul style="list-style-type: none"> <li>(i) eight hours in one day;</li> <li>(ii) 38 hours in any one week;</li> <li>(iii) 76 hours in any 14 consecutive days;</li> <li>(iv) 114 hours in any 21 consecutive days; or</li> <li>(v) 152 hours in any 28 consecutive days.</li> </ul> <p>(c) The ordinary hours for shift employees may be worked between Monday and midnight Friday, inclusive, (subject to clause 25.1(c)) and will be worked on four or five days of not more than eight hours (Monday to Friday inclusive) each continuously, except for meal breaks, at the discretion of the employer. An employee may work up to 10 ordinary hours in a day, subject to agreement between the employer and the majority of employees in the workplace or a section or sections of it. The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees in the workplace or a section or sections of it.</p> <p>(d) Where agreement is reached in accordance with clause 25.3(c), the minimum rate to be paid for a shiftworker for ordinary time worked between midnight on Friday and midnight</p>	<p>loading of 15% for work performed on either an afternoon or night shift. The Storage Services Award prescribes a higher night shift loading of 30% - double that of the Horticulture Award.</p> <ul style="list-style-type: none"> <li>• The Storage Services Award prescribes generous rates of pay for shifts worked on the weekends. Such penalties do not apply under the Horticulture Award.</li> <li>• Under the Storage Services Award, existing employees working day shifts cannot be required to work afternoon shifts.</li> </ul>

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		<p>on Saturday will be time and a half.</p> <p>(e) Where agreement is reached in accordance with clause 25.3(c), the minimum rate to be paid for <u>a shiftworker for ordinary time worked between midnight on Saturday and midnight on Sunday will be double time.</u></p> <p>(f) The extra rates in clause 25.3(d) and clause 25.3(e) are in substitution for and not cumulative upon the shift penalties.</p> <p><b>25.4 Shift allowances</b></p> <p>(a) <u>An employee while on early morning shift will be paid for such shift 12.5% more than the employee's ordinary rate.</u></p> <p>(b) <u>An employee while on afternoon shift will be paid for such shift 15% more than the employee's ordinary rate.</u></p> <p>(c) <u>An employee while on night shift will be paid for such shift 30% more than the employee's ordinary rate.</u></p> <p>(d) Employees required to work ordinary shifts on a public holiday will be paid in accordance with clause 24.5(c), instead of their shift penalty.</p> <p><b>25.5 Setting and alteration of shift roster</b></p> <p>The employer will roster shifts at least 48 hours in advance and such roster will show the commencement and finishing time of each shift. Such times having been set may be altered:</p> <p>(a) by agreement between the employer and employee; or</p> <p>(b) by the employer with the provision of 24 hours' notice in cases of changes necessitated by circumstances outside the control of the employer.</p>	
<p><b>Overtime and weekend work</b></p>	<p><b>24.2 Payment of overtime</b></p> <p>(a) <u>The rate of pay for overtime will be 150%, except for overtime worked on a Sunday.</u></p> <p>(b) <u>The rate of pay for overtime worked on a Sunday, except during harvest period, will be 200%.</u></p> <p>(c) <u>Should employees be required to work on a Saturday and the majority of such employees elect not to work on the</u></p>	<p><b>24.1 Payment for overtime</b></p> <p>All time worked by an employee in excess of or outside the ordinary hours of work prescribed by this award will be paid at the rate of <u>time and a half for the first two hours and double time after that.</u></p> <p><b>24.2 Calculation of overtime</b></p>	<p>Key differences between the Horticulture Award and Storage Services Award with regard to overtime and weekend work are set out below:</p> <ul style="list-style-type: none"> <li>The Horticulture Award prescribes an overtime rate of 150% for all overtime worked, except overtime worked on a Sunday which is paid at 200% (150% during harvest time).</li> </ul>

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Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
	<p><u>Saturday but rather on the Sunday then such work performed on that Sunday will be paid for at the rate prescribed for Saturday work.</u></p> <p><u>(d) During harvest period, the first eight hours of overtime in a week may include five hours work on a Sunday at the rate of 150% but all Sunday work in excess of the eighth overtime hour worked in the week, or in excess of five hours on a Sunday, will be paid at the rate of 200%.</u></p> <p><u>(e) All employees required to work on a Sunday will be paid for a minimum of three hours.</u></p>	<p>For the purpose of this clause:</p> <p>(a) each day or shift worked will stand alone;</p> <p>(b) <b>day</b> means all the time between the normal commencing time of one day and the normal commencing time of the next succeeding day;</p> <p>(c) <b>Saturday</b> means all the time between midnight Friday and midnight Saturday; and</p> <p>(d) <b>Sunday</b> means all the time between midnight Saturday and midnight Sunday.</p> <p><b>24.5 Penalty rates for weekends and public holidays</b></p> <p><b>(a) Saturdays</b></p> <p>(i) <u>All time worked on a Saturday must be paid for at the rate of time and a half.</u></p> <p>(ii) <u>An employee required to work overtime on a Saturday must be afforded at least three hours' work or must be paid for three hours</u> at the appropriate rate, except where such overtime is worked immediately prior to or at the conclusion of ordinary hours of work.</p> <p><b>(b) Sundays</b></p> <p>(i) <u>All time worked on a Sunday must be paid for at the rate of double time.</u></p> <p>(ii) <u>An employee required to work overtime on a Sunday must be afforded at least four hours' work or must be paid for four hours</u> at the appropriate rate, except where such overtime is worked immediately prior to or at the conclusion of ordinary hours of work.</p>	<ul style="list-style-type: none"> <li>• The Storage Services Award requires that overtime worked in excess of ordinary hours be paid at 150% for the first two hours and 200% after that.</li> <li>• The Storage Services Award prescribes that ordinary hours worked on a Saturday attracts a penalty of 150% and ordinary hours worked on a Sunday attract a penalty of 200%. Employees working overtime on these days must be provided with a minimum of three hours work on a Saturday and four hours on a Sunday.</li> <li>• The Horticulture Award allows employers and employees, with agreement, to substitute a Sunday for a Saturday at the rate prescribed for the Saturday overtime work.</li> <li>• The Horticulture Award has a specific provision to deal with the harvest period. This provision (clause 22.4(d)) enables the first eight hours of overtime in a weekly period (including up to five hours worked on a Sunday) to be paid at a rate of 150%. The Storage Services Award does not allow for such flexibility.</li> </ul>

HORTICULTURE AWARD 2010 AND STORAGE SERVICES AND WHOLESALE AWARD 2010 - COMPARISON OF KEY PROVISIONS

Key Provisions	Horticulture Award 2010 (Horticulture Award)	Storage Services and Wholesale Award 2010 (Storage Services Award)	Analysis
Public holiday penalties	<p><b>28.3 Public holiday rates of pay</b></p> <p>All work performed on public holidays will be paid for at the <u>rate of 200% of the ordinary rate.</u></p>	<p><b>24.5(c) Public holidays</b></p> <p>(i) All work performed on any of the holidays prescribed or substituted must be paid for at the rate of <u>double time and a half.</u></p> <p>(ii) <u>An employee required to work on a public holiday will be afforded at least four hours' work or be paid for four hours at the appropriate rate.</u></p>	<p>The Horticulture Award requires that a penalty of 200% be paid to an employee for work performed on public holiday.</p> <p>The Storage Services Award prescribes a higher penalty, 250%, and a minimum engagement of four hours.</p>

**IN THE FAIR WORK COMMISSION**

***Fair Work Act 2009 (Cth)***

**s.156 – FOUR YEARLY REVIEW OF MODERN AWARDS**

**AM2014/231 – HORTICULTURE AWARD 2010**

**AM2016/25 – MITOLO GROUP PTY LTD AND AUSTRALIAN INDUSTRY GROUP  
JOINT APPLICATION TO VARY THE HORTICULTURE AWARD 2010**

**WITNESS STATEMENT OF BRYAN ROBERTSON**

I, Bryan Robertson of the Virginia Horticultural Centre, Old Port Wakefield Road, Virginia, South Australia, do solemnly and sincerely declare and state the following:

1. I make this statement from my own knowledge and belief except where otherwise stated.
2. I am the Executive Officer of HortEx Alliance Incorporated (**HortEx**).
3. HortEx is a not for profit alliance supported by Federal and State funding that was established in 2011 to support vegetable growers and promote sustainable production systems in South Australia. HortEx represents its members at Local, State and Federal Government levels and offers a range of training and support opportunities to increase growers' profitability and knowledge for a sustainable farming future. It is overseen by a board of 10 members who are predominately growers from the Northern Adelaide Plains region.
4. I have been employed as Executive Officer with HortEx since May 2014.
5. Prior to being employed with HortEx, I was a Consultant and Director at my own consulting practice, Robertson Consulting. I worked in this role from June 2012 to May 2014.
6. From June 2012 to May 2014, I also worked as Business Development Manager for Resource Aviation.

7. Between December 1991 and May 2012, I held various roles in the agriculture sector as an Agronomist and Research and Development (**R&D**) Manager as follows:

- Between February 2010 and May 2012, I was a Senior Agronomist/Manager for Langseeds Rural;
- Between April 2005 and January 2010, I was R&D Manager for Seedmark;
- Between January 2004 and March 2005, I was Product Development Manager for LongReach Plant Breeders;
- Between January 2001 and December 2003, I was R&D Projects Manager for AWB Research Pty Ltd;
- Between August 1997 and December 2000 , I was R&D Manager for the South Australian Seed Growers Co-operative;
- Between December 1991 and July 1997, I was a Research Agronomist for the Queensland Department of Primary Industries.

8. In my current role, I am responsible for:

- providing information and support to HortEx members;
- assisting HortEx members with resolving any problems they are facing in their businesses. This often involves collecting detailed inside knowledge of their businesses;
- representing HortEx members at local, state and federal government levels;
- holding regular training and information workshops/sessions for HortEx members about matters including business development, marketing, profitability, trends in the industry and problems in the industry.

9. In this role I interact with vegetable growers on a daily basis. Whenever

HortEx members have any issues or require information about the industry they contact me as the first point of call. I also provide assistance and information to their employees.

10. In my previous role as a Consultant I assisted farmers with business development and making their businesses more profitable. This required having a thorough knowledge of how their businesses operate.
11. From my various roles as an R&D Manager and Agronomist I have experience working for clients in many areas of agriculture including the livestock industry, grain industry, vegetable industry and orchards. I have also had dealings with the wine industry and the mining exploration industry.
12. I hold the following qualifications:
  - Certificate IV in Project Management from the Australian College of Project Management;
  - Master of Agricultural Science from The University of Queensland;
  - Graduate Diploma in Agricultural Studies from The University of Queensland; and
  - Bachelor of Science from Griffith University
13. In addition to my current role with HortEx, I am a Board Member for Primary Producers SA (**PPSA**) and the Horticulture Coalition of SA.
14. I am also a Director and Board Member of Adelaide Plains Financial Services Ltd, which is a franchise of Bendigo Bank that represents the branches in Virginia and Elizabeth.
15. I have read and considered the joint application of the Mitolo Group Pty Ltd (**Mitolo**) and Australian Industry Group (**Ai Group**) to vary the coverage clause of the Horticulture Award 2010 (**Horticulture Award**) for the purpose of this statement.



## **HortEx membership**

16. HortEx currently has approximately 290 members. These are all vegetable growers in South Australia, located primarily in the Northern Adelaide Plains region.
17. HortEx's members produce a diverse range of vegetables, both in the field and in greenhouses. These include cabbage, cauliflower, carrots and parsnips (field vegetables) and cucumbers, capsicums, eggplants and tomatoes (greenhouse vegetables).
18. All of HortEx's members are primary producers of vegetables. They all clean, grade and pack the vegetables that they grow.
19. HortEx's members are of all different sizes and sell their produce to a range of entities both in South Australia, interstate and overseas. Buyers include merchants like the Adelaide Produce Market, supermarkets (both small ones as well as the major ones like Coles and Woolworths) and processors who then value add and process the produce further.
20. Many of HortEx's members are family-owned businesses.

## **How the businesses HortEx represents operate**

21. The vegetable growers that HortEx represents generally have multiple properties. They have a central location from which the business operates (the 'primary property' or 'home block'). They also often have secondary properties that are used for production.
22. These businesses often have multiple properties because it is difficult to acquire land of the required size in one location. Vegetable land in South Australia is highly sought after, scarce and expensive. Therefore, although the primary businesses of vegetable growers typically start from one location, as the businesses grow and more land is needed for production, businesses need to buy extra land wherever they can obtain it. It is virtually impossible today to buy one piece of land of, for example, 1000 hectares.

23. When a vegetable producing business starts, the crops will generally be grown, harvested and then washed, graded and packed at a washing and packing facility (typically known in the industry as a 'packing shed') on the original farm. However, as the business expands and more land is acquired to do the growing and meet production needs, the produce will often be grown at fields and/or greenhouses in multiple locations and then brought back to a central facility (often the original primary property) for washing, grading and packing.
24. Some smaller businesses share washing, grading and packing facilities under a commercial licence, but this is not the usual situation. Most of the vegetable growers that we represent produce and then wash, grade and pack their own produce to make it fit for purpose before they on-sell it.
25. It is not economical or practical for vegetable producers to have washing/packing facilities at every growing site owned for a number of reasons, including the following:
  - Washing, grading and packing facilities are specialised and very expensive. Specialised and unique equipment is often needed to meet fitness for purpose requirements (for example, how the products are packed for the supermarket);
  - To maintain competitive advantage. The produce would become too expensive if companies had these facilities at every growing site and efficiencies in preparing the produce for sale would be decreased;
  - High levels of electricity and gas are often needed at these facilities, but there is often not enough power at the locations where the produce is grown. For example, a lot of potatoes in South Australia are grown in the Mallee region which contains a lot of sand dunes. However, the required power infrastructure to wash and pack the produce does not exist in the Mallee region. Product prices would be driven too high if they were processed within the Mallee region as the infrastructure to operate the required facilities would need to be constructed at the expense of the grower. It is therefore often cheaper to truck the

produce to the home property to wash, grade and pack;

- High levels of water are needed in washing the produce to prepare it for market. However, in South Australia, the water is often very salty and needs to be treated first (for example via desalination or reverse osmosis). It would be very expensive and time consuming to treat the water in several locations;
- Certain labour expertise is needed in the washing, grading and packing of vegetables but the required labour is not available everywhere. Therefore, these facilities need to be in certain, central locations;
- It is important for the produce to be centrally located once it is ready for market so that it is easy to transport. In South Australia, a lot of the washing and packing facilities are located on the Northern Adelaide plains because most of the service providers and truck depots are located there. It would not be easy to transport the produce from all of the locations where it is grown. If this had to be done, produce prices would increase and some businesses would not be able to remain competitive. The ability for produce to be transported and collected easily is a key factor to being competitive in this industry.

26. It is common for the businesses that we represent to have corporate structures that consist of different legal entities. They often have different entities for different functions of the business, for example, one for seed production, field production and harvesting, and washing, grading and packing. Some of our members also have different entities for different crops they grow.

27. The reason for structuring horticulture businesses in this way is so that the horticulture business (overall) can work out the profitability of different parts of the business. Having multiple entities is also used for tax purposes and to allow for flexibility in managing different parts of the business.

## **Producing horticultural crops – fitness for purpose requirements**

28. Producing vegetables is an integrated process that involves a number of stages – from preparing the land, to seeding, growing and harvesting the produce and then cleaning, grading, cooling and packing it to make it ready for despatch. For example, producing cabbages involves the following:
- the land is prepared and the ground is treated i.e. cultivated;
  - the seedlings are planted;
  - the crops are watered and weeded and after some weeks mature;
  - at harvest time, workers hand-harvest the produce and put it on a conveyer belt which is then loaded onto bins;
  - the bins are taken back to the packing shed;
  - the cabbages are washed, graded, chilled and put into a cooling room until they are ready to be taken to the marketplace or another business for further processing (e.g. to make coleslaw);
  - generally the cabbages need to stay in the cool room for 24 hours to cool down from being out in the field and to increase their shelf life. After that time, they will be despatched quickly (within 48 hours at most).
29. Businesses in the industry view the functions of washing, grading and packing as part of the production process – it is part of the process in getting the products ‘ready for market.’
30. Vegetable growers cannot grow produce without then cleaning, grading, packing and chilling it in a cool room until it is ready for despatch. The growing and cleaning/grading/packing functions are linked because the produce will not be able to be sold anywhere unless it is properly cleaned, graded, packed and chilled. It is against government regulations to sell produce straight from the field. It is also uncommercial because it will not comply with the standards of those buying it and will therefore not be bought. It is therefore pointless to produce the best quality vegetables on the field without then picking, chilling, grading and packing the produce properly.

31. There are very strict fitness for purpose requirements imposed on vegetable growers. These are set by both the Federal Department of Health and the State Departments of Health (in South Australia - SA Health) as well as the major retailers. If the products are being exported there are also additional requirements, for example, those relating to quarantining.
32. In addition, fitness for purpose specifications vary between the different supermarkets and between different crops.
33. Vegetables typically undergo two cleaning processes. Once they have first been picked from the field, they need to be washed and cooled down as soon as possible to ensure a longer life and prevent decomposition. This generally happens out on the fields. Once the vegetables are stabilised, they then need to undergo a secondary cleaning to make them fit for purpose. This generally happens at the central cleaning, grading and packing facility.
34. The fitness for purpose requirements set by the Federal and State Departments of Health are broad but change regularly in accordance with technological advances. Generally, the requirements require that no chemical residues, pathogens, bacteria or fungus be on the produce.
35. In addition to the fitness for purpose requirements imposed by the government, the supermarkets have strict requirements relating to fitness for purpose. These requirements change as the market or customers demand. They need to be complied with otherwise vegetable growers will be at risk of losing their contracts as it is a competitive market.
36. The supermarkets have different specifications that have to be met for every vegetable grown and sold to them. These specifications vary depending on the contracts between the supermarket involved and the supplier/grower. They can relate to everything from how the vegetables are grown, to how they are harvested, washed, cooled, presented, packaged and the weight of the packages.
37. As an example, Woolworths requires one of our members to grow and pack cocktail cucumbers in a certain way. To meet Woolworth's fitness for purpose

specifications these cucumbers are required to be picked off the vine, put into a bulk container, taken to the packing shed, manually put into plastic containers and then run in a flow wrapping machine (which involves heat sealing film around the plastic containers).

38. The supermarkets also require as part of their standard operating procedures that all vegetables are kept below 10 degrees in a cool room whilst awaiting despatch. Certain fungus is known to grow very quickly if the temperature increases.
39. The Departments of Health (State and Federal) and supermarkets also require strict quality assurance. If there is a problem with produce, businesses must be able to trace back through quality assurance to where the problem has come from.
40. The supermarkets require vegetable growers to be registered for quality assurance. To be able to supply to the supermarkets, producers must have an audited quality assurance system in place that is independent from the business.
41. In this regard, Freshcare and EnviroVeg are the most accepted and recognised industry standards. They have entire manuals on what vegetable producers are required to do to provide assurance that their produce is safe to eat and has been prepared to meet customer requirements. If producers comply with either the Freshcare or EnviroVeg standards, they will be complying with the supermarkets' auditing requirements.
42. Annexed to this Statement and marked **BR1** is a copy of the Freshcare Food Safety & Quality Edition 4 Code of Practice. This is Freshcare's most current quality assurance standard.
43. The supermarkets also have their own quality assurance requirements. The supermarkets are very intrusive and want to know most aspects of what businesses are doing in producing their crop.

## **The 'farm gate'**

44. The accepted industry understanding of the term 'farm gate' is that it is a concept and not a physical thing. It refers to the time when the product leaves the primary producer in a 'fit for purpose' state for the customer.
45. The view that 'the farm gate' refers to a physical gate around a farm is archaic and not in line with what agriculture does and how it works today.
46. Although traditionally growers operated from one piece of land, there is no physical farm gate or boundary now because many businesses in the vegetable industry have multiple properties from which they run their businesses. The produce is typically grown in different locations and brought back to a central location where it washed, graded and packed to meet fitness for purpose criteria. Therefore, the modern, common understanding of the term is that produce leaves 'the farm gate' once it is ready for market.
47. Primary Industries and Regions SA (**PIRSA**), which is a key economic development agency in the Government of South Australia, requires the Horticulture Coalition of SA (of which HortEx is a part and I am a Board Member) to provide information on the farm gate value of horticultural product leaving producers in South Australia every year. This information is used by PIRSA for future economic planning.
48. I have been closely involved in the process of collecting this information for PIRSA in the past. From this it is my understanding that, for the purpose of collecting the information, produce that has left the farm gate is generally regarded as produce that is in a fit for purpose condition that is acceptable to the marketplace (with the market place referring to specifications from the supermarkets/merchants or the government).
49. I have always understood this to be how the term 'farm gate' is interpreted in the industry.

## **The nature of the horticulture industry**

50. The horticulture industry is extremely variable. This is due to the weather but

also market demands including what the supermarkets want.

51. Plants generally grow best in certain environments. As a result, there are very seasonal demands in the industry. Labour needs change and so do fitness for purpose requirements.
52. In South Australia, vegetable growers are in a Mediterranean-like environment. Winter can be very cold and not many vegetables are grown this time of year. A lot of crops only respond to spring conditions and therefore lots of crops are grown in spring. In summer, production is at its maximum potential as the plants have matured by this stage and are ready to harvest. As we head into autumn, however, production decreases as plants come to the end of their life.
53. Given this, businesses need flexibility in their operations to accommodate the seasonality of growing. The use of technology, hydroponics and greenhouses aims to give producers a good environment for growing all year round. However, the technology is expensive and not suitable for all vegetables. If not using technology, plants will only grow at certain times of the year. Onions, capsicums and eggplants are some vegetables, for example, that are only grown at certain times of the year.
54. This year, the weather has been particularly up and down in South Australia. Since July 2016 there has been lots of hot days and lots of cold days. As a result, the plants have been erratic which has meant that production yields are very up and down.
55. In the greenhouses, growers traditionally stagger their produce. But as a result of the unusual weather conditions, this year has been different. Instead of harvesting at different times like usual, this year harvesting is all happening at the same time. As a consequence, there has been a high demand for short-term labour. This is the first time this has happened but we are starting to think this may be the new norm.
56. Given the variable nature of producing horticultural crops, flexibility needs to be as high as you can get in this industry.



## **Cost and competitive pressures in the horticultural industry**

57. From my regular interaction with HortEx members and my experience working in the horticultural industry, it is my understanding that the following are the greatest cost and competitive pressures facing the industry:

- Labour costs. To my knowledge, labour is the greatest cost facing our members. This is because a lot of labour is needed to grow, harvest and prepare crops for sale but the required mechanisation or technology to harvest the plants and do quality control does not exist so humans are needed for most aspects of production. Furthermore, unlike in the US and Europe, vegetable producers in Australia do not get paid subsidies from the government to assist with the costs of production;
- Electricity and gas. A lot of power is required to produce vegetables but it is very expensive. Gas and electricity prices have recently increased significantly in South Australia so it is even more expensive now;
- Maintaining competitive advantage. Vegetable producers in South Australia are always competing against other Australian states and more recently internationally too. Given the high costs of labour in Australia, it is difficult for vegetable producers to compete for exportation opportunities internationally;
- Margins on produce. In the industry input costs are generally very high relative to the return producers receive so margins can be very thin. Given this, anything that improves input costs is an advantage. Technology can make production easier and decrease input costs, but technology is expensive and cannot be accessed in all locations.

## **Current industry practice**

58. To my knowledge the vast majority of the businesses we represent currently use the Horticulture Award for the work they undertake. I know this from my

regular interactions with our members and the various information workshops and events that we hold.

59. In February 2016, for example, HortEx held a workshop at the Virginia Horticulture Centre in South Australia for about 30 members. The purpose of this was for the members to understand their rights in relation to unions including right of entry requirements. During the workshop, the members were asked what award they apply to their operations (including the washing, grading and packing of their produce) and all of those present said the Horticulture Award.
60. Many of our members have expressed concerns to me about the prospect of labour costs increasing if the Storage Services and Wholesale Award 2010 applied instead of the Horticulture Award in relation to the washing, grading and packing of their produce. They are terrified about labour costs increasing because their input costs are already very high and they do not have the ability to control the price of their produce.
61. A number of our members have also said that they would have to re-consider whether they should remain in the industry if labour costs increase. The general perception amongst these members is that they would make more money if they sold their businesses and invested the money elsewhere.
62. From the information workshops that we hold for HortEx members it has become apparent that the businesses we represent do not understand industrial relations issues or award related matters very well. If vegetable producers that currently apply the Horticulture Award had to change the award conditions that they apply and apply multiple awards, I am concerned that there would be a lot of confusion and anxiety amongst our members as to what they need to do. It would make things very complex, especially because most of the businesses that we represent are family owned and run and do not have expertise in industrial relations.

**Date:** 22 December 2016

**TO BE DECLARED IN THE WITNESS BOX**



**Freshcare**

**Food Safety & Quality  
Edition 4**

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**Code of Practice**

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## Introduction

### Purpose and scope

The Freshcare Code of Practice Food Safety & Quality is an industry owned standard, describing the good agricultural practices required on farm to provide assurance that fresh produce is safe to eat and has been prepared to meet customer requirements.

The Code identifies good agricultural practices required to:

- identify and assess the risk of food safety hazards that may occur during land preparation, growing, harvesting and packing of fresh produce
- prevent or minimise the risk of food safety hazards occurring
- prepare produce to customer specifications
- identify, trace and withdraw/recall produce
- manage staff and documentation
- review compliance.

The Freshcare Program offers benefits to both suppliers and customers. It verifies that an industry recognised food safety and quality program is followed. Certification to the Freshcare Program is achieved through independent third-party auditing to the Code of Practice by auditors working for approved Certification Bodies.

The Freshcare Program meets the requirements of a wide range of customer groups and forms the basis of many approved supplier programs.

Freshcare continues to work closely with key customer groups, maintaining a level of awareness of program developments and ensuring continued compliance with market requirements.

### Disclaimer

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## **Acknowledgments**

Many individuals and organisations have been involved in the development of the fourth edition of the Freshcare Code of Practice Food Safety & Quality. Their contribution and support is much appreciated.

Freshcare also thanks the contributors to previous editions of the Freshcare Code of Practice Food Safety & Quality.

## Code Review Process

The Freshcare Technical Committee is responsible for the review and amendment of this Code of Practice. Participating Freshcare businesses are advised of all Code updates and should ensure that they are operating with the current edition of the Code of Practice at all times.

The Technical Committee encourages suggestions for improving this Code of Practice from all users. Suggestions should be submitted in writing to Freshcare Ltd.

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Sydney Markets	Email	info@freshcare.com.au
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## Using the Code

The requirements of the Code of Practice, called elements, are grouped into two sections – Management and Food Safety & Quality. Specific compliance criteria and risk assessments are also included in the Code Appendix. The Management elements, Food Safety & Quality elements and Appendix information are all mandatory requirements for Freshcare Food Safety & Quality Certification.

Each element describes the outcomes required, the practices needed to ensure compliance and records that may be required to demonstrate compliance. This forms the basis of Freshcare Training and together with the Freshcare Forms and Resources provides the foundations for the effective implementation of the Freshcare Program on farm.

Freshcare resources are available to participating businesses electronically via FreshcareOnline for Growers. To have your FreshcareOnline logon reissued, please email info@freshcare.com.au or contact the Freshcare Office.


For more information, visit the Freshcare website [www.freshcare.com.au](http://www.freshcare.com.au).


## Freshcare Code of Practice Food Safety & Quality Edition 4


### Management


Code Element		Compliance Criteria	Records
<b>M1</b>	<b>Scope and commitment</b>		
M1.1	Define the business scope and the scope of Freshcare certification.	<ol style="list-style-type: none"> <li>1. The scope of Freshcare certification is defined by the owner or appropriate senior manager.</li> <li>2. All business enterprises and activities undertaken are recorded.</li> <li>3. Flowcharts are completed to document the crops and activities for which Freshcare certification is required.</li> </ol>	<p>Form – M1 Scope</p> <p>Form – M1 Flowchart</p>
M1.2	Identify property areas, infrastructure and local activities on a property map.	<ol style="list-style-type: none"> <li>1. A property map is documented and maintained. The map identifies: <ul style="list-style-type: none"> <li>• property boundaries and adjacent infrastructure such as public roads and public places (schools, sports fields)</li> <li>• local activities that may impact food safety (other agricultural enterprises, waste treatment plants)</li> <li>• production areas and growing sites</li> <li>• farm houses, buildings, sheds, on-farm roads and access points</li> <li>• toilet facilities, septic tanks and seepage pads</li> <li>• workers accommodation and facilities</li> <li>• bulk fuel storage, including underground tanks</li> <li>• chemical storage areas, mixing areas, equipment clean-down areas, dip sites (postharvest, livestock) and disposal trenches/evaporation ponds</li> <li>• storage sites for waste, including controlled wastes (empty chemical containers awaiting collection)</li> <li>• fertiliser and soil additive storage, composting/ageing and mixing/loading areas</li> <li>• areas that are contaminated (persistent chemicals, heavy metals, fertilisers, waste, physical contaminants)</li> <li>• water sources, extraction points and delivery infrastructure.</li> </ul> </li> </ol>	Property map
M1.3	Define the business organisational structure.	<ol style="list-style-type: none"> <li>1. The organisational structure of the business is documented and must include: <ul style="list-style-type: none"> <li>• workers responsible for the management of food safety and quality</li> <li>• reporting relationships of all workers whose roles may affect food safety and quality.</li> </ul> </li> </ol>	Organisational chart




Code Element		Compliance Criteria	Records
M1.4	Document the business commitment to the Freshcare Code of Practice.	<ol style="list-style-type: none"> <li>1. The owner or appropriate senior manager signs a commitment statement to support and comply with the Freshcare Code of Practice Food Safety &amp; Quality, Freshcare Rules and all legislative requirements.</li> <li>2. The commitment statement is communicated to all workers.</li> </ol>	Form – M1 Commitment statement
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Factsheet – M1 Scope and commitment</li> <li>• Freshcare Crop List</li> </ul>	<b>External Resources</b>	

Code Element		Compliance Criteria	Records
<b>M2</b>	<b>Documentation</b>		
M2.1	Verify compliance with the Freshcare Code of Practice through relevant documents and records.	<ol style="list-style-type: none"> <li>1. Current editions of the Freshcare Code of Practice Food Safety &amp; Quality and the Freshcare Rules are kept.</li> <li>2. All records and documents required to verify compliance to this Code of Practice are legible and must include: <ul style="list-style-type: none"> <li>• title</li> <li>• date of issue or version number</li> <li>• business name</li> <li>• name of person completing the record and date of completion.</li> </ul> </li> <li>3. As documents and records change, out-of-date versions are replaced.</li> <li>4. All records are kept for a minimum of two years (or longer if required by legislation or customers).</li> </ol>	<p>Freshcare Code of Practice Food Safety &amp; Quality</p> <p>Freshcare Rules</p>
	<b>Freshcare Resources</b>	<b>External Resources</b>	
	<ul style="list-style-type: none"> <li>• Factsheet – M2 Documentation</li> <li>• Freshcare Code of Practice Food Safety &amp; Quality</li> <li>• Freshcare Rules</li> </ul>		


Code Element		Compliance Criteria	Records
<b>M3</b>	<b>Training</b>		
M3.1	Complete Freshcare training.	1. A management representative completes approved Freshcare Food Safety & Quality training. Evidence is kept. <i>(See Appendix A-M3).</i>	Training certificate
M3.2	Train all workers who complete tasks relevant to this Code of Practice to ensure a base level of food safety awareness.	<ol style="list-style-type: none"> <li>1. Training is provided for workers who complete tasks relevant to this Code of Practice.</li> <li>2. All workers must receive basic food safety training before starting work.</li> <li>3. Training is provided in the relevant language for workers, or pictorially.</li> <li>4. A record of internal and external training is kept and must include: <ul style="list-style-type: none"> <li>• name and signature of trainee</li> <li>• name of trainer or training provider</li> <li>• topic of the training</li> <li>• date of training and expiry date (when applicable).</li> </ul> </li> <li>5. A review of training is conducted at least annually or when tasks and/or workers change.</li> </ol>	<p>Form – M3 Training record – internal FSQ</p> <p>Form – M3 Training record – other</p>
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Appendix – A-M3 Approved Freshcare training</li> <li>• Factsheet – M3 Training</li> </ul>	<b>External Resources</b>	

Code Element		Compliance Criteria	Records
<b>M4 Internal audit and corrective action</b>			
M4.1	Conduct internal audits to verify ongoing compliance with this Code of Practice.	<ol style="list-style-type: none"> <li>1. An internal audit of all activities and records relevant to the Freshcare Code of Practice Food Safety &amp; Quality is conducted at least annually. A record is kept.</li> <li>2. Workers responsible for completing sections of the internal audit are identified and, where possible, are independent of the practices being assessed.</li> </ol>	Form – M4 Internal audit report
M4.2	Complete corrective actions for any non-compliance.	<ol style="list-style-type: none"> <li>1. A Corrective Action Record (CAR) must be completed when the requirements of the Freshcare Code of Practice Food Safety &amp; Quality, Freshcare Rules or legislation are not being met, as identified by: <ul style="list-style-type: none"> <li>• routine activities</li> <li>• annual internal audits</li> <li>• annual external audits</li> <li>• a valid complaint received from a neighbour, customer or regulatory authority</li> <li>• produce identified as being contaminated, or potentially contaminated.</li> </ul> </li> <li>2. A Corrective Action Record must include: <ul style="list-style-type: none"> <li>• description of the problem</li> <li>• cause of the problem</li> <li>• whether or not the problem has occurred before</li> <li>• short term fix (action taken to fix the problem)</li> <li>• long term fix (action taken to prevent the problem recurring)</li> <li>• confirmation that short term and long term actions are completed and effective</li> <li>• name and signature of person completing the review</li> <li>• date of the review.</li> </ul> </li> <li>3. Reoccurrences of non-compliance are reviewed by the owner or appropriate senior manager.</li> </ol>	Form – M4 Corrective action record (CAR)
 <b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Factsheet – M4 Internal audit and corrective action</li> </ul>		<b>External Resources</b>	

Code Element		Compliance Criteria	Records
<b>M5</b>	<b>Customer requirements</b>		
M5.1	Comply with customer specifications.	<ol style="list-style-type: none"> <li>1. Where a written product specification has been provided by, or agreed with a customer, a copy of the specification is kept.</li> <li>2. Product is checked to ensure it meets the agreed specification before dispatch. When required by the customer, a record is kept.</li> <li>3. If product does not meet the agreed specification, the customer is informed of the variation and the agreed course of action is implemented and recorded.</li> </ol>	<p>Product specifications</p> <p>Product inspection records</p>
	<b>Freshcare Resources</b>		<b>External Resources</b>
	<ul style="list-style-type: none"> <li>• Factsheet – M5 Customer requirements</li> </ul>		<ul style="list-style-type: none"> <li>• Freshspecs <a href="http://www.freshmarkets.com.au/fresh-specs">www.freshmarkets.com.au/fresh-specs</a></li> </ul>

## Food Safety & Quality


Code Element		Compliance Criteria	Records
<b>F1</b>	<b>Hazard analysis</b>		
F1.1	Conduct risk assessments for persistent chemicals.	<ol style="list-style-type: none"> <li>1. Risk assessments are conducted for each growing site to determine the risk of persistent chemical contamination of produce from the soil/growing medium. A record is kept. <i>(See Appendix RA-F1.1).</i></li> <li>2. If the risk assessments conducted in F1.1.1 determine the risk of the hazard is high, relevant control measures, monitoring and verification activities are implemented. <i>(See Appendix RA-F1.1).</i></li> </ol>	Form – F1 Risk assessment – persistent chemicals
F1.2	Conduct risk assessments for heavy metals.	<ol style="list-style-type: none"> <li>1. Risk assessments are conducted for each growing site to determine the risk of heavy metal contamination of produce from the soil/growing medium. A record is kept. <i>(See Appendix RA-F1.2).</i></li> <li>2. If the risk assessments conducted in F1.2.1 determine the risk of the hazard is high, relevant control measures, monitoring and verification activities are implemented. <i>(See Appendix RA-F1.2).</i></li> </ol>	Form – F1 Risk assessment – heavy metals
F1.3	Conduct risk assessments for fertilisers and soil additives.	<ol style="list-style-type: none"> <li>1. Risk assessments are conducted for all growing sites to determine the risk of microbial contamination of produce from fertilisers and/or soil additives. A record is kept. <i>(See Appendix RA-F1.3).</i></li> <li>2. If the risk assessments conducted in F1.3.1 determine the risk of the hazard is high, relevant control measures, monitoring and verification activities are implemented. <i>(See Appendix RA-F1.3).</i></li> </ol>	Form – F1 Risk assessment – fertilisers and soil additives
F1.4	Conduct risk assessments for preharvest water.	<ol style="list-style-type: none"> <li>1. Risk assessments are conducted for all preharvest water used to determine the risk of microbial contamination of produce from preharvest water. A record is kept. <i>(See Appendix RA-F1.4).</i></li> <li>2. If the risk assessments conducted in F1.4.1 determine the risk of the hazard is high, relevant control measures, monitoring and verification activities are implemented. <i>(See Appendix RA-F1.4).</i></li> </ol>	Form – Risk assessment – preharvest water

Code Element		Compliance Criteria	Records
F1.5	Where an additional food safety hazard is identified within the scope of this Code of Practice, a risk assessment is conducted and additional actions implemented if required by the hazard analysis.	<ol style="list-style-type: none"> <li>1. A risk assessment must be conducted for any additional food safety hazard identified within the scope of the Freshcare Code of Practice Food Safety &amp; Quality. A record is kept.</li> <li>2. If the risk assessment conducted in F1.5.1 determines the risk of the hazard identified is high, relevant control measures, monitoring and verification activities are implemented.</li> </ol>	Form – F1 Risk assessment – other practices
F1.6	Where an aspect of this Code of Practice is not implemented, it is supported by a risk assessment detailing reasons for exclusion.	<ol style="list-style-type: none"> <li>1. A risk assessment must be conducted to support any aspect of the Freshcare Code of Practice Food Safety &amp; Quality that is not implemented and must clearly detail the reason for any exclusion. A record is kept.</li> </ol>	Form – F1 Risk assessment – other practices
F1.7	Review risk assessments at least annually.	<ol style="list-style-type: none"> <li>1. All risk assessments are reviewed at least annually, or when changes occur that may impact the significance of the hazards.</li> </ol>	
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Appendix – RA-F1.1 Risk assessment – persistent chemicals</li> <li>• Appendix – RA-F1.2 Risk assessment – heavy metals</li> <li>• Appendix – RA-F1.3 Risk assessment – fertilisers and soil additives</li> <li>• Appendix – RA-F1.4 Risk assessment – preharvest water</li> <li>• Factsheet – F1 Hazard analysis</li> </ul>	<b>External Resources</b> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 3 Food safety hazards associated with fresh produce, page 7</li> </ul>	

Code Element		Compliance Criteria	Records
<b>F2</b>	<b>Growing site</b>		
F2.1	Manage growing sites to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. If the risk assessment conducted in F1.1 identified the risk of persistent chemical contamination of produce from the soil/growing medium is high, the additional control measures specified in the risk assessment are implemented. <i>(See Appendix RA-F1.1).</i></li> <li>2. If the risk assessment conducted in F1.2 identified the risk of heavy metal contamination of produce from the soil/growing medium is high, the additional control measures specified in the risk assessment are implemented. <i>(See Appendix A-F5 and RA-F1.2).</i></li> <li>3. Growing sites are assessed for potential of spray drift.</li> <li>4. Where spray drift is likely, plantings are planned to minimise the risk of contaminating non-target produce.</li> <li>5. For growing sites affected by a flood event, planting must be scheduled to ensure the period between flood water subsiding and harvest exceeds 90 days for produce where the harvestable part is grown in, or has direct contact with the soil, and may be eaten uncooked.</li> <li>6. Livestock is not permitted on growing sites within: <ul style="list-style-type: none"> <li>• 90 days of intended harvest date for produce where the harvestable part is grown in, or has direct contact with the soil, and may be eaten uncooked, or</li> <li>• 45 days of intended harvest date for all other produce.</li> </ul> </li> <li>7. Growing sites are assessed for potential of physical contamination.</li> <li>8. Where physical contamination is likely, sites are inspected before ground preparation and physical contaminants are removed or managed to minimise the risk of contaminating produce.</li> <li>9. Sites/areas contaminated with physical contaminants are identified on the property map.</li> </ol>	<p>Form – F1 Risk assessment – persistent chemicals</p> <p>Soil/growing medium test for persistent chemicals</p> <p>Produce residue test result for persistent chemicals</p> <p>Form – F1 Risk assessment – heavy metals</p> <p>Produce residue test result for heavy metals</p> <p>Form – F2 Livestock movement record</p> <p>Property map</p>
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Appendix – A-F5 Limits for heavy metal contaminants in growing medium and fertilisers and soil additives</li> <li>• Appendix – RA-F1.1 Risk assessment – persistent chemicals</li> <li>• Appendix – RA-F1.2 Risk assessment – heavy metals</li> <li>• Factsheet – F2 Growing site</li> </ul>	<b>External Resources</b> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 5 Managing the growing site and planting material, page 18</li> <li>• Food Standards Australia New Zealand (FSANZ) Food Standards Code – Section 1.4.1 – Contaminants and natural toxicants, Section 1.4.2 Agvet chemicals and associated Schedules – Schedule 19, 20 and 21 <a href="http://www.foodstandards.gov.au">www.foodstandards.gov.au</a></li> <li>• Australian Standard AS4454 (2012) Composts soil conditioners and mulches</li> </ul>	






Code Element		Compliance Criteria	Records
<b>F3</b>		<b>Planting materials</b>	
F3.1	Manage planting materials to minimise the risk of contaminating produce.	1. Planting materials are purchased from suppliers that are managed in accordance with the supplier requirements specified in F11.1.	
	<b>Freshcare Resources</b>		<b>External Resources</b>
	<ul style="list-style-type: none"> <li>Factsheet – F3 Planting materials</li> </ul>		<ul style="list-style-type: none"> <li>Guidelines for Fresh Produce Food Safety (2015) Chapter 5 Managing the growing site and planting material, page 18</li> <li>Plant Health Australia <a href="http://www.planthealthaustralia.com.au">www.planthealthaustralia.com.au</a></li> </ul>


Code Element		Compliance Criteria	Records
<b>F4</b>	<b>Chemicals</b>		
F4.1	Obtain properly labelled chemicals from approved suppliers and ensure labels remain legible.	<ol style="list-style-type: none"> <li>1. Chemicals are purchased from suppliers that are managed in accordance with the supplier requirements specified in F11.1.</li> <li>2. Chemical containers are adequately labelled and in acceptable condition on receipt.</li> <li>3. Deteriorating chemical labels are replaced immediately with a legible copy.</li> <li>4. All chemicals purchased are recorded in a chemical inventory. A record is kept and must include: <ul style="list-style-type: none"> <li>• date received</li> <li>• place of purchase</li> <li>• name of chemical</li> <li>• batch number (where available)</li> <li>• expiry date or date of manufacture</li> <li>• quantity.</li> </ul> </li> </ol>	Form – F4 Chemical inventory
F4.2	Store, manage and dispose of chemicals to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Chemical storage areas are: <ul style="list-style-type: none"> <li>• located and constructed to minimise the risk of contaminating produce directly, or indirectly, through contamination of growing sites or water sources</li> <li>• structurally sound, adequately lit and constructed to protect chemicals from direct sunlight and weather exposure</li> <li>• equipped with a spill kit to contain and manage chemical spills</li> <li>• secure, with access restricted to authorised workers.</li> </ul> </li> <li>2. Chemicals are stored in designated separate areas for each category of chemical, and for chemicals awaiting disposal.</li> <li>3. Chemicals are stored in original containers according to directions on the container label. If a chemical is transferred to another container for storage purposes, the new container is a clean chemical container and a copy of the chemical label is applied to the new container.</li> <li>4. Stored chemicals are checked at least annually to identify and segregate chemicals for disposal that have: <ul style="list-style-type: none"> <li>• exceeded the label expiry date</li> <li>• exceeded the permit expiry date</li> <li>• had their registration withdrawn</li> <li>• containers that are leaking, corroded or have illegible labels.</li> </ul> </li> </ol> <p style="text-align: right;"><i>(Continues over page)</i></p>	Property map  Form – F4 Chemical inventory

Code Element		Compliance Criteria	Records
		5. A record of the check is kept and must include: <ul style="list-style-type: none"> <li>• date of the check</li> <li>• name and quantity of chemicals awaiting disposal</li> <li>• name of authorised person conducting the check.</li> </ul> 6. Unusable chemicals and empty chemical containers are legally disposed of through registered collection agencies or approved off-farm disposal areas. A record of disposal is kept.	
F4.3	Train and authorise workers who store, handle, apply and dispose of chemicals.	1. Workers involved in the supervision of the storage, handling, application and disposal of chemicals: <ul style="list-style-type: none"> <li>• have successfully completed a recognised chemical users course, or equivalent (<i>See Appendix A-F4</i>)</li> <li>• are competent in chemical storage, handling, application and disposal as specified by the Freshcare Code of Practice Food Safety &amp; Quality.</li> </ul> 2. Workers authorised to store, handle, apply and dispose of chemicals have been trained. 3. A register of workers authorised to store, handle, apply and/or dispose of chemicals is maintained and displayed in the chemical storage area.	Record of completion of farm chemical users course  Form – F4 Chemical authorisation record
F4.4	Use chemicals according to regulatory, label and market requirements.	1. Chemicals are used and applied: <ul style="list-style-type: none"> <li>• according to label directions, or</li> <li>• under ‘off-label permits’ issued by the Australian Pesticides and Veterinary Medicines Authority (APVMA), with a current copy of the permit kept, or</li> <li>• according to relevant state legislation for ‘off-label use’, and</li> <li>• according to specific customer and/or destination market requirements.</li> </ul> 2. Chemicals are checked for their withholding period before use.	Copies of applicable off-label permits
F4.5	Avoid potential for spray drift.	1. Chemicals are not applied when the risk of contaminating adjacent crops or off-target areas with spray drift is high. 2. Potential and actual spray drift incidents are identified. A record is kept.	

Code Element		Compliance Criteria	Records
F4.6	Maintain and calibrate chemical application equipment.	<ol style="list-style-type: none"> <li>1. Chemical application equipment is maintained and checked for effective operation before and during each use.</li> <li>2. Equipment is calibrated at least annually or as per manufacturer's instructions and immediately after spray nozzles are replaced.</li> <li>3. Equipment is calibrated using a recognised method. A record of calibration is kept and must include: <ul style="list-style-type: none"> <li>• date of calibration</li> <li>• method of calibration and results</li> <li>• name of person calibrating the equipment.</li> </ul> </li> </ol>	<p>Calibration records</p> <p>Form – F8 Calibration record</p>
F4.7	Manage mixing and disposal of chemical solutions to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Chemical mixing areas are located to minimise the risk of contaminating produce directly, or indirectly, through contamination of growing site or water sources.</li> <li>2. Leftover chemical solutions are disposed of according to label directions where specified, or in a manner that minimises the risk of contaminating produce directly, or indirectly, through contamination of growing site or water sources.</li> </ol>	<p>Property map</p>
F4.8	Record all chemical applications.	<ol style="list-style-type: none"> <li>1. Records of all preharvest chemical applications are kept and must include: <ul style="list-style-type: none"> <li>• application date</li> <li>• start and finish times</li> <li>• location and crop</li> <li>• chemical used (including batch number if available)</li> <li>• rate of application and quantity applied</li> <li>• equipment and/or method used to apply the chemical</li> <li>• withholding period (WHP) or earliest harvest date (EHD)</li> <li>• wind speed and direction</li> <li>• name and signature of person who applied the chemical.</li> </ul> </li> <li>2. Records of all postharvest chemical treatments are kept and must include: <ul style="list-style-type: none"> <li>• treatment date and time</li> <li>• produce treated</li> <li>• chemical used (including batch number if available)</li> <li>• rate of application and/or quantity applied</li> <li>• equipment and/or method used to apply the chemical</li> <li>• withholding period (WHP) (where applicable)</li> <li>• name and signature of person who carried out the chemical treatment.</li> </ul> </li> </ol>	<p>Form – F4 Preharvest chemical application record</p> <p>Form – F4 Postharvest chemical application record</p>


Code Element	Compliance Criteria	Records
F4.9	<p>Test produce for chemical residues to verify that chemicals are applied correctly, withholding periods are observed and produce complies with MRLs.</p> <ol style="list-style-type: none"> <li>1. A chemical residue test is conducted before initial Freshcare certification and then annually, or more frequently, if required by a customer specification.</li> <li>2. A chemical residue test is: <ul style="list-style-type: none"> <li>• a multi-screen test that includes chemicals used in the spray program</li> <li>• conducted on a random sample of produce that has had all preharvest and postharvest chemical treatments completed and is ready for sale and/or consumption</li> <li>• conducted by a laboratory with NATA accreditation to ISO/IEC 17025 for the analysis of chemical residues.</li> </ul> </li> <li>3. Chemical residue levels do not exceed: <ul style="list-style-type: none"> <li>• Maximum Residue Limits (MRLs) as specified by Food Standards Australia New Zealand (FSANZ)</li> <li>• Maximum Residue Limits (MRLs) as specified by a customer and/or the importing country (where applicable).</li> </ul> </li> </ol>	Produce residue test result
	<p><b>Freshcare Resources</b></p> <ul style="list-style-type: none"> <li>• Appendix – A-F4 Freshcare requirements for chemical user training</li> <li>• Factsheet – F4 Chemicals</li> </ul>	<p><b>External Resources</b></p> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 8 Managing chemicals, page 51</li> <li>• Australian Pesticides and Veterinary Medicines Authority (APVMA): Database of registrations and permits for Agvet chemicals <a href="http://www.apvma.gov.au">www.apvma.gov.au</a></li> <li>• Food Standards Australia New Zealand (FSANZ) Food Standards Code – Section 1.4.2 Agvet chemicals and associated Schedules – Schedule 20 and 21 <a href="http://www.foodstandards.gov.au">www.foodstandards.gov.au</a></li> <li>• Infopest: Comprehensive Agvet chemical database <a href="http://www.infopest.com.au">www.infopest.com.au</a></li> <li>• ChemClear: Disposal of Agvet chemicals <a href="http://www.chemclear.com.au">www.chemclear.com.au</a></li> <li>• DrumMUSTER: Disposal of Agvet chemical containers <a href="http://www.drummuster.com.au">www.drummuster.com.au</a></li> </ul>


Code Element	Compliance Criteria	Records
<b>F5</b>	<b>Fertilisers and soil additives</b>	
F5.1	<p>Manage fertilisers and soil additives to minimise the risk of contaminating produce.</p> <ol style="list-style-type: none"> <li>1. Human effluent or biosolids are not used.</li> <li>2. Fertilisers and soil additives comply with heavy metal limits specified in AS4454-2012 Composts soil conditioners and mulches. <i>(See Appendix A-F5).</i></li> <li>3. Storage sites for fertilisers and soil additives are located, constructed and maintained to minimise the risk of contaminating produce directly, or indirectly, through contamination of growing site or water sources.</li> <li>4. Specified exclusion periods between application of fertilisers and soil additives and crop harvest (identified in the risk assessment conducted in F1.3) must be observed. <i>(See Appendix A-F5 and RA-F1.3).</i></li> <li>5. Fertilisers and soil additives containing manures and/or food waste used within the specified exclusion periods must be treated using an approved treatment process. Evidence is kept. <i>(See Appendix A-F5).</i></li> <li>6. Liquid or foliar sprays, derived from untreated manures, that may contact the harvestable part of the crop must not be used within: <ul style="list-style-type: none"> <li>• 90 days of intended harvest date for produce that may be eaten uncooked, or</li> <li>• 45 days of intended harvest date for all other produce.</li> </ul> </li> <li>7. All other liquid or foliar sprays that may contact the harvestable part of the crop must meet preharvest water requirements.</li> <li>8. Fertilisers and soil additives are not applied when the risk of contaminating off-target areas due to wind drift and/or runoff is high.</li> <li>9. Records of all fertiliser and soil additive applications are kept and must include: <ul style="list-style-type: none"> <li>• application date</li> <li>• location and crop</li> <li>• product used</li> <li>• rate of application</li> <li>• wind speed and direction</li> <li>• method of application/incorporation</li> <li>• name of person applying the fertilisers and soil additives.</li> </ul> </li> </ol>	<p>Property map</p> <p>Form – F1 Risk assessment – fertilisers and soil additives</p> <p>Copies of certification for suppliers of treated fertilisers and soil additives</p> <p>Certificate of analysis for treated fertilisers and soil additives</p> <p>Form – F5 Fertilisers and soil additives treatment record</p> <p>Form – F5 Fertilisers and soil additives application record</p>

Code Element	Compliance Criteria	Records
	<p><b>Freshcare Resources</b></p> <ul style="list-style-type: none"> <li>Appendix – A-F5 Limits for heavy metal contaminants in growing medium and fertilisers and soil additives</li> <li>Appendix – A-F5 Evidence of compliance for treated fertilisers and soil additives</li> <li>Appendix – RA-F1.3 Risk assessment – fertilisers and soil additives</li> <li>Factsheet – F5 Fertilisers and soil additives</li> </ul>	<p><b>External Resources</b></p> <ul style="list-style-type: none"> <li>Guidelines for Fresh Produce Food Safety (2015) Chapter 6 Managing fertilisers and soil additives, page 27</li> <li>Australian Standard AS4454 (2012) Composts soil conditioners and mulches</li> </ul>

Code Element		Compliance Criteria	Records
<b>F6</b>	<b>Water</b>		
F6.1	Manage water sources and infrastructure.	<ol style="list-style-type: none"> <li>All water sources used preharvest and postharvest are identified. A record is kept.</li> <li>Water sources are managed to minimise potential contamination from: <ul style="list-style-type: none"> <li>human activities</li> <li>livestock and domestic animals</li> <li>wildlife (where possible)</li> <li>adjacent activities.</li> </ul> </li> <li>Water extraction points, water storage and delivery infrastructure and irrigation equipment is checked and maintained.</li> <li>Water storage tanks, water dumps, flumes and treatment tanks are: <ul style="list-style-type: none"> <li>constructed of materials that will not contaminate the water</li> <li>clean and maintained.</li> </ul> </li> </ol>	<p>Form – F6 Water source record</p> <p>Property map</p>
F6.2	Manage preharvest water to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>Water sources contaminated by toxic algae are not used if preharvest water directly contacts the harvestable part of the crop.</li> <li>Reclaimed or recycled water used meets the appropriate specification as defined in the Australian Guidelines for Water Recycling (2006). Water suppliers provide test results that verify water quality.</li> <li>If the risk assessment conducted in F1.4 identified the risk of microbial contamination of produce from preharvest water use is high, all water used within 48 hours of harvest must meet <i>E. coli</i> &lt;100 cfu/100mL. Evidence is kept. (See Appendix A-F6 and RA-1.4).</li> <li>Produce that has come into contact with flood water is not harvested unless it meets limits of <i>E. coli</i> &lt;10 cfu/g and <i>Salmonella</i> Not Detected/25g, or customer specifications.</li> </ol>	<p>Form – F1 Risk assessment – preharvest water</p> <p>Preharvest water test results</p>
F6.3	Manage postharvest water to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>Water sources contaminated by toxic algae are not used postharvest.</li> <li>Water used postharvest for pre-washing (removing soil and debris) where there is a subsequent wash step, must meet specified microbial limits for preharvest water.</li> <li>All other water used postharvest must meet, or is treated to achieve, <i>E. coli</i> &lt;1 cfu/100mL. Evidence is kept. (See Appendix A-F6).</li> <li>Water in recirculation systems, water dumps, flumes and treatment tanks is changed at an appropriate frequency to maintain water quality.</li> <li>Any variations to postharvest water quality must be supported by a risk assessment and associated documentation and be verified at audit.</li> </ol>	<p>Postharvest water test results</p> <p>Form – F6 Water treatment monitoring record</p>




F6.4	Manage all other water usage.	<ol style="list-style-type: none"> <li>1. Water used for hand washing meets <i>E. coli</i> &lt;1 cfu/100mL. Evidence is kept. Where water is not proven to meet <i>E. coli</i> &lt;1 cfu/100mL an alcohol-based hand sanitiser must be used after washing hands with soap and water. (See Appendix A-F6).</li> <li>2. Water used for cleaning equipment, containers or other produce contact surfaces must meet <i>E. coli</i> &lt;1 cfu/100mL. Evidence is kept. (See Appendix A-F6).</li> <li>3. Any variations to water quality must be supported by a risk assessment and associated documentation and be verified at audit.</li> </ol>	
	<p><b>Freshcare Resources</b></p> <ul style="list-style-type: none"> <li>• Appendix – A-F6 Evidence of compliance for water</li> <li>• Appendix – RA-F1.4 Risk assessment – preharvest water</li> <li>• Factsheet – F6 Water</li> </ul>	<p><b>External Resources</b></p> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 7 Managing water, page 33</li> <li>• Australian Guidelines for Water Recycling (2008)</li> </ul>	


Code Element		Compliance Criteria	Records
<b>F7 Allergens</b>			
F7.1	Identify and manage potential sources of allergens.	<ol style="list-style-type: none"> <li>1. Raw material inputs are reviewed for known allergens.</li> <li>2. If allergens are identified, an allergen management plan is documented and must include: <ul style="list-style-type: none"> <li>• a list of all raw materials and/or produce containing allergens</li> <li>• how these products are used, stored and handled</li> <li>• control measures to prevent cross-contamination.</li> </ul> </li> <li>3. Workers are trained to identify, remove and avoid introducing allergens.</li> </ol>	Form – F7 Allergen management plan
	<b>Freshcare Resources</b>		<b>External Resources</b>
	<ul style="list-style-type: none"> <li>• Factsheet – F7 Allergens</li> </ul>		<ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 16 Allergens, page 82</li> <li>• Allergen Bureau <a href="http://www.allergenbureau.net">www.allergenbureau.net</a></li> </ul>


Code Element		Compliance Criteria	Records
<b>F8</b>		<b>Premises, facilities, equipment, tools, packaging and vehicles</b>	
F8.1	Construct and maintain growing, packing and storage facilities to ensure they are suitable for the production and preparation of produce.	<ol style="list-style-type: none"> <li>1. Growing, packing (including in-field packing) and storage facilities are constructed and maintained to minimise the risk of contaminating produce.</li> <li>2. Mezzanine floors, walkways and stairs are designed and constructed to minimise the risk of contaminating produce.</li> <li>3. Lighting in growing, packing and storage areas is adequate for the tasks performed.</li> <li>4. Lights above produce handling and storage areas are fitted with shatter proof covers and/or shatter proof bulbs.</li> <li>5. Glass, hard or brittle plastic, ceramic or similar materials are removed from produce handling and storage areas. Where this is not possible, precautions are taken to ensure these materials do not contaminate produce.</li> <li>6. Items that are not needed for production are removed from produce handling and storage areas. Items needed for production are managed to minimise the risk of contaminating produce.</li> <li>7. Surfaces that contact produce in the packing area are cleaned and maintained to ensure they do not contaminate produce.</li> <li>8. Produce is not stored with or near materials that may present a risk of contaminating produce.</li> <li>9. Chemicals, grease, oil, fuel and farm machinery are segregated from packing and produce storage areas.</li> <li>10. Workshop equipment is not operated during production or is screened to prevent contamination of produce.</li> <li>11. Facilities are kept clean, and are subject to regular cleaning.</li> </ol>	
F8.2	Construct and maintain facilities for handling and packing produce for retail sale (includes, but is not limited to, retail crates, pre-packs).	<ol style="list-style-type: none"> <li>1. The packing and storage of produce for retail sale is conducted in a designated clean area, and constructed and maintained to minimise the risk of contaminating packed produce.</li> <li>2. Hand washing facilities are easily accessed by workers before entry into the packing area.</li> <li>3. Facilities are reviewed at the start of the production season and at least weekly during operation. A record is kept.</li> </ol>	Form – F8 Facilities audit checklist

Code Element		Compliance Criteria	Records
F8.3	Provide and maintain toilets and hand washing facilities.	<ol style="list-style-type: none"> <li>1. Toilets and hand washing facilities must be: <ul style="list-style-type: none"> <li>• located to minimise the risk of contaminating produce and maximise accessibility</li> <li>• kept clean, and regularly maintained and serviced</li> <li>• designed to ensure hygienic removal of waste and to minimise the risk of contaminating produce directly, or indirectly, through contamination of growing site or water sources</li> <li>• equipped with running water (as specified in F6.4.1), liquid soap, mechanism/s for effective hand drying, and waste disposal facilities (<i>See Appendix A-F8</i>)</li> <li>• hand washing instructions are displayed.</li> </ul> </li> <li>2. For produce that has an edible skin and may be eaten uncooked, all workers must apply hand sanitiser before handling produce or materials that may come into contact with produce.</li> </ol>	
F8.4	Construct and maintain septic, waste and drainage systems to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Septic, waste disposal and drainage systems are designed, located and constructed to minimise the risk of contaminating produce directly, or indirectly, through contamination of growing site or water sources.</li> <li>2. Drains are designed to: <ul style="list-style-type: none"> <li>• prevent ponding in areas where produce is handled and stored</li> <li>• prevent pests entering the facility</li> <li>• enable regular cleaning.</li> </ul> </li> <li>3. Drains must be kept clean.</li> </ol>	Property map
F8.5	Maintain and clean tools, equipment and containers that contact produce.	<ol style="list-style-type: none"> <li>1. Tools, equipment, and containers are made of substances that are non-toxic, and designed and constructed to enable regular cleaning and maintenance.</li> <li>2. Tools, equipment, and containers are stored in a manner that minimises contamination.</li> <li>3. Handheld harvesting tools are cleaned each day before use, and accounted for at the end of each day.</li> <li>4. For produce that has an edible skin, and may be eaten uncooked: <ul style="list-style-type: none"> <li>• produce containers used at harvest are handled to avoid produce being contaminated by soil or other physical contaminants</li> <li>• a food grade liner is used when containers cannot be effectively cleaned.</li> </ul> </li> </ol> <p style="text-align: right;"><i>(Continues over page)</i></p>	


Code Element		Compliance Criteria	Records
		<ol style="list-style-type: none"> <li>5. Wooden bins and pallets are checked for cleanliness, foreign objects, pest infestation and protruding nails or splinters. Where required, bins and pallets are cleaned, repaired, rejected or covered with a protective material.</li> <li>6. Containers used for storing waste, chemicals or dangerous substances are clearly identified and not used for produce.</li> </ol>	
F8.6	Maintain monitoring and measuring equipment.	<ol style="list-style-type: none"> <li>1. Monitoring and measuring equipment is identified, checked for operational efficiency and accuracy, and calibrated using a recognised method at a predetermined frequency. A record is kept.</li> </ol>	<p>Form – F8 Measuring and monitoring equipment register</p> <p>Form – F8 Calibration record</p>
F8.7	Manage packaging materials to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Packaging materials used for retail sale are food grade.</li> <li>2. Packaging materials are stored in a manner that minimises contamination.</li> <li>3. All packaging is checked for cleanliness, foreign objects and pest infestation. Where required, packaging is cleaned, rejected or covered with a protective material.</li> </ol>	
F8.8	Construct and maintain cooling systems to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Cooling systems are checked to ensure they are operating at specified temperatures. Systems are maintained and calibrated.</li> <li>2. Measures are taken to prevent condensate and defrost water from cooling systems contacting produce.</li> </ol>	Form – F8 Calibration record
F8.9	Manage produce transport vehicles to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. Produce is not transported under conditions or with other goods that present a potential source of contamination.</li> <li>2. Transport vehicles are checked before use for cleanliness, foreign objects and pest infestation. Where necessary, vehicles are cleaned to prevent contamination of produce.</li> <li>3. Transport refrigeration systems are checked to ensure they are operating at specified temperatures.</li> </ol>	


Code Element		Compliance Criteria	Records
F8.10	Preventative maintenance, and cleaning is effective to minimise the risk of contaminating produce.	<ol style="list-style-type: none"> <li>1. A documented plan of preventive maintenance is followed. The plan describes: <ul style="list-style-type: none"> <li>• areas/equipment</li> <li>• details of maintenance</li> <li>• frequency of maintenance</li> <li>• name of person responsible for ensuring maintenance is completed.</li> </ul> </li> <li>2. A documented plan is followed for cleaning of produce handling and storage areas, equipment, containers, materials and vehicles that come into contact with produce. The plan describes: <ul style="list-style-type: none"> <li>• areas and items to be cleaned</li> <li>• cleaning agents and the methods used</li> <li>• frequency of cleaning</li> <li>• name of person responsible for ensuring cleaning is completed.</li> </ul> </li> <li>3. Chemicals used for cleaning are approved for use in a food handling area and are used according to label instructions.</li> <li>4. Cleaning materials and equipment are stored and managed to minimise the risk of contaminating produce.</li> <li>5. Cleaning is effective.</li> </ol>	<p>Form – F8 Preventive maintenance plan</p> <p>Form – F8 Cleaning plan</p>
F8.11	Waste is managed and appropriately disposed of.	<ol style="list-style-type: none"> <li>1. Waste containers are provided, appropriate for use, clearly identified and emptied on a regular basis.</li> <li>2. Waste disposal is appropriate for the type of waste generated.</li> <li>3. Waste storage and disposal sites are located to minimise the risk of contaminating produce, are clearly identified and kept clean and tidy.</li> </ol>	Property map
	<p><b>Freshcare Resources</b></p> <ul style="list-style-type: none"> <li>• Appendix A-F8 Approved mechanisms for hand drying</li> <li>• Factsheet – F8 Premises, facilities, equipment, tools, packaging and vehicles</li> </ul>	<p><b>External Resources</b></p> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 9 Managing facilities, page 57</li> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 10 Managing equipment and tools, page 61</li> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 11 Managing containers and packaging materials, page 66</li> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 12 Vehicle maintenance and hygiene, page 70</li> </ul>	


Code Element		Compliance Criteria	Records
<b>F9</b>		<b>Animals and pests</b>	
F9.1	Measures are taken to minimise animal and pest presence.	<ol style="list-style-type: none"> <li>In and around areas where produce is grown, packed and stored, measures are taken to: <ul style="list-style-type: none"> <li>minimise animal and pest presence</li> <li>exclude wildlife and domestic animals</li> <li>discourage roosting of birds.</li> </ul> </li> </ol>	
F9.2	Document and implement a plan for managing pests.	<ol style="list-style-type: none"> <li>A documented plan is followed to manage pests in and around growing, packing and storage areas. The plan must include: <ul style="list-style-type: none"> <li>method used</li> <li>location of baits and traps</li> <li>frequency of checking baits and traps</li> <li>name of person responsible for placing, checking and restocking baits and traps.</li> </ul> </li> <li>Method and chemicals used for pest management are: <ul style="list-style-type: none"> <li>appropriate for use in growing, packing and storage areas</li> <li>used according to label instructions</li> <li>not applied to the harvestable part of the crop.</li> </ul> </li> <li>Baits and traps used for pest management are located and contained to minimise the risk of contaminating produce, packaging containers, materials and equipment.</li> <li>Pest control measures are monitored to ensure they are effective. A record is kept.</li> </ol>	<p>Form – F9 Pest management plan</p> <p>Form – F9 Pest monitoring record</p>
 <b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>Factsheet – F9 Animals and pests</li> </ul>		<b>External Resources</b> <ul style="list-style-type: none"> <li>Guidelines for Fresh Produce Food Safety (2015) Chapter 13 Pest and animal control, page 72</li> </ul>	


Code Element		Compliance Criteria	Records
<b>F10</b>	<b>People</b>		
F10.1	Food safety instructions are communicated to workers and visitors to minimise the risk of chemical, microbial and physical contamination of produce.	<ol style="list-style-type: none"> <li>Written food safety instructions are provided to workers and visitors and must include requirements for: <ul style="list-style-type: none"> <li>health status</li> <li>personal hygiene</li> <li>management of clothing and personal items</li> <li>general behaviour.</li> </ul> </li> <li>Food safety instructions are reinforced with prominent signs and/or basic written or pictorial training guides.</li> <li>Compliance with food safety and hygiene requirements is monitored.</li> </ol>	Form – F10 Food safety instructions
F10.2	Manage access to the property and growing sites.	<ol style="list-style-type: none"> <li>Entry to the property and growing sites is restricted to authorised persons.</li> </ol>	
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>Factsheet – F10 People</li> <li>Signs are available for download on the Freshcare eLearning website <a href="http://www.freshcare.com.au/elearning">www.freshcare.com.au/elearning</a></li> </ul>	<b>External Resources</b> <ul style="list-style-type: none"> <li>Guidelines for Fresh Produce Food Safety (2015) Chapter 14 Managing People, page 75</li> </ul>	



Code Element		Compliance Criteria	Records
<b>F11</b>	<b>Suppliers</b>		
F11.1	Identify and manage materials and services that may introduce a food safety risk.	<ol style="list-style-type: none"> <li>Suppliers of materials and services that may introduce a food safety risk are identified. A record is kept and reviewed annually.</li> <li>Suppliers of materials and services identified in F11.1.1 must comply with the applicable requirements of the Freshcare Code of Practice Food Safety &amp; Quality.</li> <li>Evidence of compliance for suppliers of materials and services is kept and must include: <ul style="list-style-type: none"> <li>identification as a Freshcare Recognised Supplier, or</li> <li>independent evidence of compliance, or</li> <li>a written declaration to comply with requirements, or</li> <li>a record of inspection/assessment against requirements.</li> </ul> </li> <li>Purchase records are kept for materials and services identified in F11.1.1 and must include: <ul style="list-style-type: none"> <li>name of supplier</li> <li>date of purchase</li> <li>material or service supplied.</li> </ul> </li> </ol>	<p>Form – F11 Supplier table</p> <p>Supplier acknowledgements of compliance</p> <p>Evidence of compliance to requirements</p> <p>Purchase and inspection records from suppliers</p>
F11.2	Manage Freshcare certified produce.	<ol style="list-style-type: none"> <li>All produce represented for sale as Freshcare certified must be: <ul style="list-style-type: none"> <li>grown by a business currently certified to Freshcare Code of Practice Food Safety &amp; Quality or a food safety program recognised by Freshcare</li> <li>packed by a business currently certified to Freshcare Code of Practice Food Safety &amp; Quality or a food safety program recognised by Freshcare.</li> </ul> </li> </ol>	
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>Factsheet – F11 Suppliers</li> <li>Freshcare Recognised Suppliers List is available on the Freshcare website <a href="http://www.freshcare.com.au">www.freshcare.com.au</a></li> <li>List of food safety programs recognised by Freshcare is available on the Freshcare website <a href="http://www.freshcare.com.au">www.freshcare.com.au</a></li> </ul>	<b>External Resources</b> <ul style="list-style-type: none"> <li>Guidelines for Fresh Produce Food Safety (2015) Chapter 15 Suppliers of inputs and services, page 81</li> </ul>	

Code Element		Compliance Criteria	Records
<b>F12</b>	<b>Food defence and food fraud</b>		
F12.1	Identify potential food defence threats that may impact food safety and implement control measures where required.	<ol style="list-style-type: none"> <li>1. A food defence vulnerability assessment is completed to assess the risk of intentional contamination of: <ul style="list-style-type: none"> <li>• raw materials (business inputs or produce)</li> <li>• end product.</li> </ul> </li> <li>2. Where a food defence threat is identified, a control plan is documented.</li> </ol>	Form – F12 Food defence vulnerability assessment and control plan
F12.2	Identify potential vulnerabilities for food fraud that may impact food safety and implement control measures where required.	<ol style="list-style-type: none"> <li>1. A food fraud vulnerability assessment is completed to assess the potential risk of intentional adulteration, substitution or misrepresentation of: <ul style="list-style-type: none"> <li>• raw materials (business inputs or produce)</li> <li>• end product.</li> </ul> </li> <li>2. Where a food fraud vulnerability is identified, a control plan is documented.</li> </ol>	Form – F12 Food fraud vulnerability assessment and control plan
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Factsheet – F12 Food fraud and food defence</li> </ul>	<b>External Resources</b>	

Code Element	Compliance Criteria	Records
<b>F13</b>	<b>Product identification and traceability</b>	
F13.1	<p>Maintain a product identification and traceability system to enable produce to be traced from production to its destination.</p> <ol style="list-style-type: none"> <li>1. A record of all produce harvested is kept and must include: <ul style="list-style-type: none"> <li>• crop/variety</li> <li>• growing site</li> <li>• earliest harvest date in consideration of exclusion periods</li> <li>• harvest date</li> <li>• packing date</li> <li>• batch identification code (where applicable)</li> <li>• quantity</li> <li>• destination.</li> </ul> </li> <li>2. Where harvested produce is sent to another business for packing or further processing, each delivery is clearly identified with supplier name and harvest or delivery date.</li> <li>3. A record of all produce received from suppliers is kept and must include: <ul style="list-style-type: none"> <li>• supplier business name</li> <li>• crop/variety</li> <li>• date received</li> <li>• packing date</li> <li>• batch identification code (where applicable).</li> </ul> </li> <li>4. All packed produce sent to a customer is marked with: <ul style="list-style-type: none"> <li>• business name and physical address</li> <li>• packing date and/or batch identification code</li> <li>• other trade descriptions required by customer or legislation.</li> </ul> </li> </ol>	<p>Form – F13 Harvest and packing record</p> <p>Form – F13 Supplier traceability</p> <p>Dispatch records</p>
	<p><b>Freshcare Resources</b></p> <ul style="list-style-type: none"> <li>• Factsheet – F13 Product identification and traceability</li> </ul>	<p><b>External Resources</b></p> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 17 Product identification, traceability and recall, page 85</li> </ul>

Code Element		Compliance Criteria	Records
<b>F14</b>	<b>Recall</b>		
F14.1	Maintain a product recall system enabling unsafe produce to be effectively recalled.	<ol style="list-style-type: none"> <li>1. In the event of a potentially serious food safety issue, the matter is investigated to determine the extent of the problem. Where required, further action is taken.</li> <li>2. Establish the level of recall relevant for the produce supplied to customers as a: <ul style="list-style-type: none"> <li>• trade level recall, or</li> <li>• consumer level recall.</li> </ul> </li> <li>3. If a recall is required, the relevant recall is implemented.</li> <li>4. Where produce is supplied direct to consumers, a mock recall is completed annually using the A&amp;NZ Product Recall/Withdrawal form. A record is kept.</li> </ol>	<p>Form – F14 Trade level recall form</p> <p>A&amp;NZ Product Recall/Withdrawal form</p> <p>Mock recall record</p>
	<b>Freshcare Resources</b> <ul style="list-style-type: none"> <li>• Factsheet – F14 Recall</li> </ul>	<b>External Resources</b> <ul style="list-style-type: none"> <li>• Guidelines for Fresh Produce Food Safety (2015) Chapter 17 Product identification, traceability and recall, page 88</li> <li>• Updated copies of the A&amp;NZ Product Recall/Withdrawal form can be found on the Australian Food and Grocery Council website <a href="http://www.afgc.org.au/publications">www.afgc.org.au/publications</a></li> <li>• Food Standards Australia New Zealand (FSANZ) <a href="http://www.foodstandards.gov.au/industry/foodrecalls">www.foodstandards.gov.au/industry/foodrecalls</a></li> </ul>	

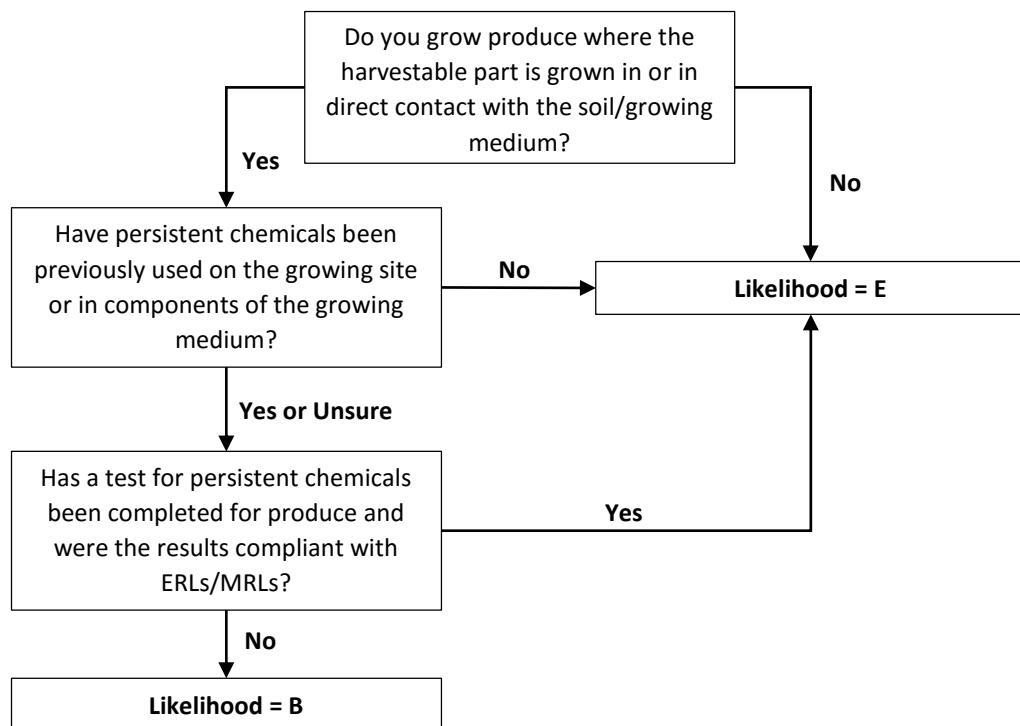
## Appendix

Reference table	
Reference	Compliance Criteria
A-M3	<p>Approved Freshcare training includes:</p> <ul style="list-style-type: none"> <li>• Freshcare Food Safety &amp; Quality Edition 4 Training</li> <li>• Freshcare Food Safety &amp; Quality 3<sup>rd</sup> Edition Training.</li> </ul>
A-F4	<p>Freshcare requires the following national competencies be included in all farm chemical user training qualifications:</p> <ul style="list-style-type: none"> <li>• Level 3 – AHCCHM303A – Prepare and apply chemicals</li> <li>• Level 3 – AHCCHM304A – Transport, handle and store chemicals.</li> </ul>
A-F5	<p>Limits for heavy metal contaminants in growing medium and fertilisers and soil additives comply with those specified in AS4454-2012:</p> <ul style="list-style-type: none"> <li>• Cadmium &lt;1mg/kg (dry weight basis)</li> <li>• Lead &lt;150mg/kg (dry weight basis).</li> </ul> <p>Evidence of compliance for treated fertilisers and soil additives containing manures and/or food waste:</p> <ul style="list-style-type: none"> <li>• <b>Sourced from suppliers with an approved certified treatment process</b> – evidence of certification to AS4454-2012 is provided.</li> <li>• <b>Sourced from suppliers that follow a documented, verified treatment process (AS4454-2012 or other equivalent time/temperature treatments)</b> – details of the treatment process and a Certificate of Analysis for each batch of product supplied to verify the treatment process achieves <i>E. coli</i> &lt;100 cfu/g, <i>Salmonella</i> Not Detected/25g.</li> <li>• <b>Treated on farm to a documented, verified treatment process (AS4454-2012 or other equivalent time/temperature treatments)</b> – treatment records are kept and must include: <ul style="list-style-type: none"> <li>○ product composition</li> <li>○ description of treatment method</li> <li>○ treatment start and end date</li> <li>○ date and temperature readings</li> <li>○ batch identification code</li> <li>○ estimated quantity of batch</li> <li>○ name of person that supervised the treatment.</li> </ul> </li> </ul> <p>A Certificate of Analysis for each batch of product is kept to verify the treatment process achieves <i>E. coli</i> &lt;100 cfu/g, <i>Salmonella</i> Not Detected/25g.</p>

Reference table	
Reference	Compliance Criteria
A-F6	<p>Evidence of compliance for water quality:</p> <ul style="list-style-type: none"> <li>• <b>External supplier e.g. town water</b> – certificate of compliance.</li> <li>• <b>Water treated on-farm</b> – water treatment process is documented and water tested to verify treatment process is effective. Treatment and monitoring records are kept. If water source or treatment method changes, process is reviewed, documented and water tested to verify treatment process is effective.</li> <li>• <b>Untreated water</b> – each water source is tested: <ul style="list-style-type: none"> <li>○ monthly during period of use, or</li> <li>○ annually before use once it is historically proven to achieve specified limits (at least 4 consecutive tests below specified limits).</li> </ul> </li> </ul>
A-F8	<p>Toilets and hand washing facilities must be equipped with mechanism/s for effective hand drying. Hand drying facilities must be used effectively and properly maintained to minimise the risk of contamination to produce. Approved mechanisms for effective hand drying include:</p> <ul style="list-style-type: none"> <li>• disposable paper towels</li> <li>• hand dryers.</li> </ul>

## RA-F1.1 Risk assessment – persistent chemicals

A risk assessment is to be conducted for each growing site/crop combination.



### Additional actions for high significance

If the hazard analysis identified the risk of persistent chemical contamination of produce from soil/growing medium is high, the following additional control measures must also be implemented:

- Test the soil/growing medium for persistent chemicals AND/OR After harvest, test produce for persistent chemical residues.
- Sites/areas contaminated with persistent chemicals are identified on the property map.
- Contaminated sites are managed to ensure that produce grown at that site complies with ERLs/MRLs.

### Persistent chemicals hazard analysis

Hazard	Possible cause(s)	Sev*	Li*	Sig*	Action
<b>Chemical:</b> Chemical residues in produce exceeds MRL/ERL.	Soil/growing medium contains residues of persistent chemicals.	3			If <b>low significance</b> , no additional action is required. If <b>high significance</b> , implement additional actions for high significance – persistent chemicals.

\*Sev = Severity, Li = Likelihood, Sig = Significance

### Significance matrix

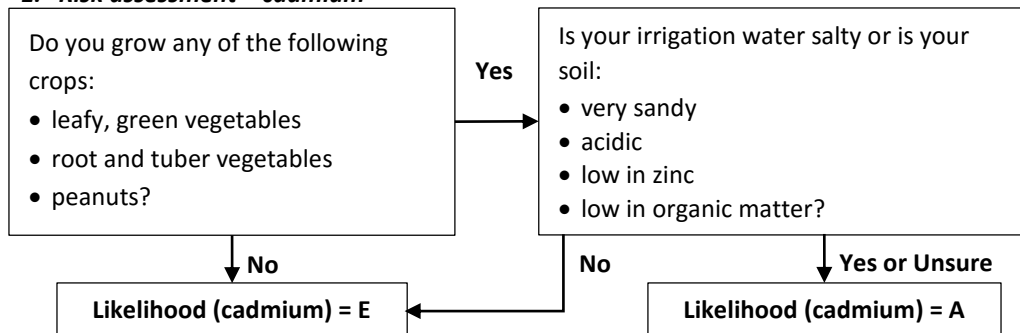
Severity	Likelihood
1. Fatality	A. Common occurrence
2. Serious sickness	B. Known to occur
3. Product recall	C. Could occur
4. Customer complaint	D. Not expected to occur
5. Not significant	E. Practically impossible

Severity	Likelihood				
	A	B	C	D	E
1	High	High	High	High	Low
2	High	High	High	Low	Low
3	High	High	Low	Low	Low
4	High	Low	Low	Low	Low
5	Low	Low	Low	Low	Low

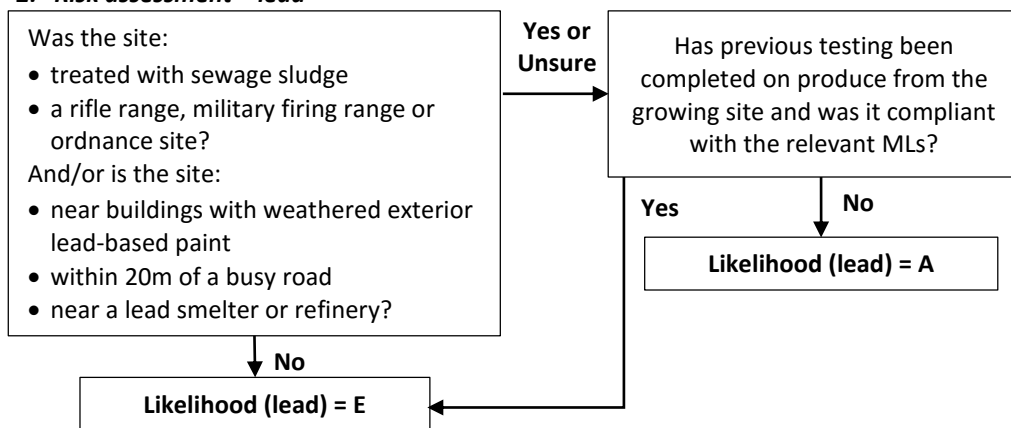
## RA-F1.2 Risk assessment – heavy metals

A risk assessment is to be conducted for each growing site/crop combination.

### 1. Risk assessment – cadmium



### 2. Risk assessment – lead



#### Additional actions for high significance

If the hazard analysis identified the risk of heavy metal contamination of produce from soil/growing medium is high, the following additional control measures must also be implemented:

- Test the produce for cadmium residues AND/OR Test the produce for lead residues.
- Sites/areas contaminated with cadmium and/or lead are identified on the property map.
- Contaminated sites are managed to ensure that produce grown at that site complies with MLs.

### Heavy metals hazard analysis

Hazard	Possible cause(s)	Sev*	Li*	Sig*	Action
<b>Chemical:</b> Chemical residues in produce exceeds ML.	Soil/growing medium contains residues of <b>cadmium</b> from previous use of growing site.	3			If <b>low significance</b> , no additional action is required. If <b>high significance</b> , implement additional actions for high significance – heavy metals.
	Soil/growing medium contains residues of <b>lead</b> from previous use of growing site.	3			If <b>low significance</b> , no additional action is required. If <b>high significance</b> , implement additional actions for high significance – heavy metals.

\*Sev = Severity, Li = Likelihood, Sig = Significance

#### Significance matrix

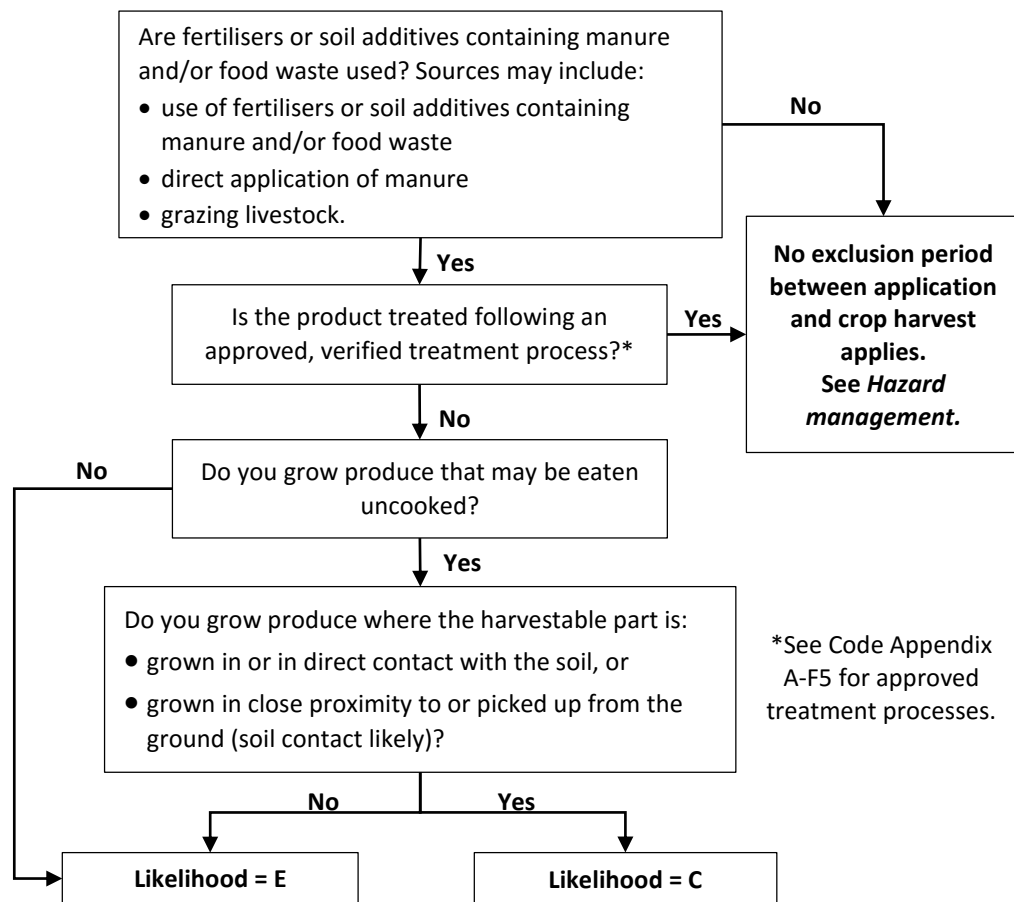
Severity	Likelihood
1. Fatality	A. Common occurrence
2. Serious sickness	B. Known to occur
3. Product recall	C. Could occur
4. Customer complaint	D. Not expected to occur
5. Not significant	E. Practically impossible

Severity	Likelihood				
	A	B	C	D	E
1	High	High	High	High	Low
2	High	High	High	Low	Low
3	High	High	Low	Low	Low
4	High	Low	Low	Low	Low
5	Low	Low	Low	Low	Low



## RA-F1.3 Risk assessment – fertilisers and soil additives

A risk assessment is to be conducted for each growing site/crop combination.



### Significance matrix

Severity	Likelihood
1. Fatality	A. Common occurrence
2. Serious sickness	B. Known to occur
3. Product recall	C. Could occur
4. Customer complaint	D. Not expected to occur
5. Not significant	E. Practically impossible

### Fertilisers and soil additives hazard management

Hazard management	Records
<input type="checkbox"/> Use only fertilisers or soil additives that do not contain manure and/or food waste.	Purchase records and product specification are kept.
<input type="checkbox"/> Use only fertilisers or soil additives containing manures and/or food waste that have been appropriately treated.	Maintain evidence of compliance for treated fertilisers and soil additives.

### Fertilisers and soil additives hazard analysis

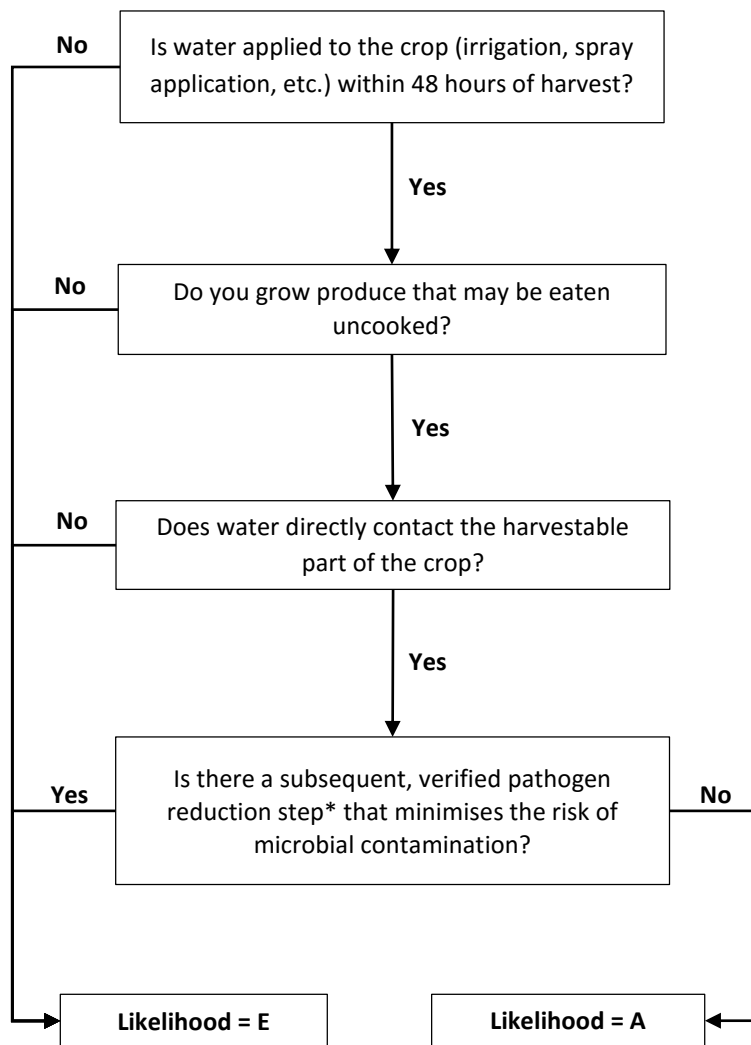
Hazard	Possible cause(s)	Sev*	Li*	Sig*	Action
<b>Microbial:</b> Microbial contamination of produce.	Microbial contamination of produce from: • manure remaining on growing site from livestock, or • use of untreated fertilisers or soil additives, or • ineffective treatment of fertilisers or soil additives.	1			If <b>low significance</b> , exclusion periods between application and crop harvest is 45 days.  If <b>high significance</b> , exclusion periods between application and crop harvest is 90 days.

\*Sev = Severity, Li = Likelihood, Sig = Significance

Severity	Likelihood				
	A	B	C	D	E
1	High	High	High	High	Low
2	High	High	High	Low	Low
3	High	High	Low	Low	Low
4	High	Low	Low	Low	Low
5	Low	Low	Low	Low	Low

## RA-F1.4 Risk assessment – preharvest water

A risk assessment is to be conducted for each water use/crop combination.



\* Step that is proven to result in a microbiological reduction, supported by documented evidence and/or records.

### Preharvest water hazard analysis

Hazard	Possible cause(s)	Sev*	Li*	Sig*	Action
<b>Microbial:</b> Microbial contamination of produce.	Microbial contamination of preharvest water source.	1			If <b>low significance</b> , no water quality limit applies to preharvest water use.  If <b>high significance</b> , all water used within 48 hours of harvest must meet <i>E. coli</i> <100 cfu/100mL.

\*Sev = Severity, Li = Likelihood, Sig = Significance

### Significance matrix

Severity	Likelihood
1. Fatality	A. Common occurrence
2. Serious sickness	B. Known to occur
3. Product recall	C. Could occur
4. Customer complaint	D. Not expected to occur
5. Not significant	E. Practically impossible

Severity	Likelihood				
	A	B	C	D	E
1	High	High	High	High	Low
2	High	High	High	Low	Low
3	High	High	Low	Low	Low
4	High	Low	Low	Low	Low
5	Low	Low	Low	Low	Low

## Glossary

Term	Definition
<b>Adjacent</b>	Immediately adjoining, neighbouring, surrounding, lying near or close by.
<b>Allergen</b>	Any substance that can induce an abnormally vigorous immune response in certain individuals in the population. Allergens can cause symptoms such as skin rashes, swelling, breathing difficulties or, in severe cases, potentially fatal anaphylaxis. The most common allergens are peanuts, tree nuts, sesame seeds, sulphites (>10mg/kg), eggs, milk, crustaceans, grains containing gluten and soy products.
<b>Approved supplier</b>	A supplier who is approved by the business to provide a product or service that meets defined specifications.
<b>AS4454 Composts, soil conditioners and mulches</b>	An Australian Standard that specifies requirements for organic products and mixtures of organic products that are to be used to amend the physical and chemical properties of natural or artificial soils and growing media.
<b>Audit</b>	A systematic examination of compliance, to determine whether practices that have been implemented are being followed and to ensure that the system achieves its aims.
<b>Australian Pesticides and Veterinary Medicines Authority (APVMA)</b>	Australian government authority responsible for the assessment and registration of agricultural and veterinary chemical products.
<b>Authorised person</b>	A person delegated the right to perform a task or access specific areas of a business. Authorisation may be in consideration of training completed or position held.
<b>Biosolid</b>	Solid or semisolid by-product obtained from treated human sewage or wastewater.
<b>Business enterprise</b>	Any business undertaking occurring on the property that may have an impact on the food safety or quality of crops grown. May include, but is not limited to horticulture, broadacre, livestock and dairy operations.
<b>Calibrate</b>	To check, adjust, make corrections or determine accuracy by comparison with a standard.
<b>Chemical</b>	Products such as insecticides, acaricides, herbicides, fungicides, growth regulators, pheromones and other organic treatments used to control pest, disease, weeds and growth, applied on or around the property, production areas and on harvested produce. It also includes other products used on-farm such as fruit waxes, sanitisers, cleaning agents and grease.
<b>Cleaning</b>	The removal of dirt, grease, plant parts, other foreign matter and microorganisms that may contaminate produce.
<b>Commitment statement</b>	A formalised statement on behalf of a business committing to meeting the requirements of the Freshcare Code of Practice Food Safety & Quality and Freshcare Rules. A commitment statement must be signed by the owner or appropriate senior manager, and communicated to all workers.
<b>Competent</b>	Demonstration of knowledge and skills to complete tasks to specified performance criteria.

<b>Term</b>	<b>Definition</b>
<b>Contamination</b>	The introduction or occurrence of a direct or indirect food safety hazard to produce. Types of contamination include physical, chemical, microbiological and allergenic. Contamination may be introduced via growing sites, water sources, packing facilities, people, pests or other sources.
<b>Control measure</b>	Any action taken to prevent, minimise or eliminate a hazard.
<b>Controlled waste</b>	A waste that, unless properly managed, can harm human health and the environment. It is the most hazardous category of waste and disposal of controlled wastes is regulated. Types of controlled waste include agricultural chemicals, chemical containers, tyres and oil.
<b>Corrective Action Record (CAR)</b>	A written record of an issue, or issues, which must be addressed to demonstrate compliance with the Freshcare Code of Practice Food Safety & Quality or Freshcare Rules. They may be documented during internal audits (self-assessment), external audits, or during routine farm activities.
<b>Customer</b>	A commercial packer, marketing group, wholesaler, exporter, processor, retailer or consumer who receives produce from a supplier.
<b>Earliest Harvest Date (EHD)</b>	The earliest date produce may be harvested in consideration of any exclusion periods that may apply from the application or use of preharvest water, fertilisers and soil additives, or chemicals.
<b>Exclusion period</b>	The time between the use of an input (e.g. preharvest water, fertilisers and soil additives) and the intended harvest date of the crop.
<b>External audit</b>	A third party audit of business operations and records against the Freshcare Code of Practice Food Safety & Quality and Freshcare Rules to independently assess performance to the Freshcare Standard.
<b>Extraneous Residue Limit (ERL)</b>	The maximum permitted limit of a pesticide residue, arising from environmental sources other than the use of a pesticide directly or indirectly on the food, expressed in milligrams of the chemical per kilogram of the food (mg/kg).
<b>Facility</b>	A structure or building in which produce is grown, packed, or stored.
<b>Fertiliser and soil additives</b>	Products that are added to the soil to improve fertility and structure or control weeds. Examples include inorganic (chemical) fertilisers such as lime and gypsum; and those of organic origin such as animal manure, sawdust, compost, compost tea, seaweed, fish-based products, other biological compounds and those derived from food waste.
<b>Flood event</b>	The submersion or flooding of a growing site by water outside a grower's control that may contain microbial food safety hazards and may contact the harvestable part of the crop.
<b>Flowchart</b>	A diagram identifying the sequence of activities undertaken in a procedure or process.
<b>Food defence</b>	The protection of food products and raw materials from intentional contamination or adulteration. Food defence deals with the prevention, protection, minimisation, response and action to be taken if a food defence vulnerability or threat is identified.

<b>Term</b>	<b>Definition</b>
<b>Food fraud</b>	The deception of customers or consumers for economic gain by providing food, ingredients or packaging which is different to that specified. Food fraud can include presentation of substandard products as well as adulteration of food with undeclared or low quality ingredients.
<b>Food Standards Australia New Zealand (FSANZ)</b>	A Government agency responsible for developing and administering the 'Australia New Zealand Food Standards Code'.
<b>Food waste</b>	Waste from the manufacture, preparation, sale or consumption of food but does not include grease trap waste or animal waste, and must not be corrosive.
<b>Freshcare Food Safety &amp; Quality training</b>	Training to the Freshcare Code of Practice Food Safety & Quality, provided by an approved Freshcare trainer or via completion of the Freshcare Food Safety & Quality eLearning course.
<b>Freshcare Rules</b>	A document released by Freshcare Limited, detailing the requirements of businesses participating in the Freshcare Program.
<b>Good Agricultural Practices (GAP)</b>	Practices used to prevent or minimise the risk of hazards occurring during growing, harvesting, packing, storage and transport of produce. The scope of hazards in this Code of Practice is food safety and quality.
<b>Growing site</b>	Anywhere that fresh produce is produced. Includes paddocks, orchards, greenhouses, shade houses and growth rooms/chambers.
<b>Hazard</b>	A chemical, physical or microbial agent in fresh produce that can potentially cause injury or illness to a consumer if not controlled. A quality hazard is any factor that prevents produce from meeting customer, quarantine or legal requirements.
<b>Hazard analysis</b>	The method of identifying potential hazards, assessing the significance of the risk posed by each hazard, and determining the practices that prevent or satisfactorily minimise the risk of the hazard occurring.
<b>Hazard Analysis Critical Control Point (HACCP)</b>	The process by which food safety hazards occurring within the operations of a business are assessed and managed.
<b>Heavy metals</b>	Usually defined as metals with a specific gravity of four or more, meaning they are at least four times heavier than water for a given volume. Some (not all) heavy metals are toxic, particularly cadmium, lead and mercury.
<b>Historically proven</b>	A number of consecutive tests conducted at a nominated frequency to demonstrate compliance to specified limits.
<b>Internal audit</b>	An audit conducted by the business to review its own processes and system management.
<b>Livestock</b>	Farm animals including, but not limited to, cattle, sheep, pigs, goats and poultry.
<b>Management representative</b>	An employee, worker, agent, officer, director, advisor, partner, consultant, contractor or sub-contractor who is appointed to represent and/or manage on behalf of a business.
<b>Manure</b>	Animal faeces, including that from livestock, poultry or wild animals, but not including human waste.

<b>Term</b>	<b>Definition</b>
<b>Maximum Level (ML)</b>	The maximum level of a specified contaminant, or specified natural toxicant, which is permitted to be present in a nominated food expressed, unless otherwise specified, in milligrams of the contaminant or the natural toxicant per kilogram of the food (mg/kg).
<b>Maximum Residue Limit (MRL)</b>	This is the legal limit for a specific residue in food. MRLs are set at levels that are unlikely to be exceeded if chemicals are used according to label instructions.
<b>Microbial contamination</b>	The unwanted presence of microbes. A microbe is a living microorganism, which can be single-celled or multicellular. In the context of food safety, microbes include bacteria, fungi and viruses as well as microscopic protozoan parasites such as <i>Giardia</i> .
<b>Monitoring</b>	A planned sequence of observations and measurements to assess whether control measures are effective.
<b>Non-compliance</b>	A failure to comply with the requirements of the Freshcare Code of Practice Food Safety & Quality or Freshcare Rules.
<b>Off-target</b>	Any misplacement or movement away from the target to which the property activity is directed. For example, spray drift on to neighbouring area/crop or nutrient runoff into sensitive areas.
<b>Organisational chart</b>	A diagram that depicts the organisational structure of a business and relationships of workers' roles in the management of food safety and quality.
<b>Organisational structure</b>	The chain of command or hierarchy of workers within an organisation or business.
<b>Pathogen reduction step</b>	A process which results in at least a 2-log reduction in the number of viable pathogens on a product or in water. This is equivalent to 99% mortality. Pathogen reduction steps often involve application of a sanitiser (e.g. 100ppm chlorine), but can also use a process such as curing or irradiation to achieve the same result.
<b>Persistent chemicals</b>	Organochlorine pesticides and other chemical residues in the soil that may cause unacceptable residues in produce.
<b>Pests</b>	Rats, mice, birds, cockroaches and other animals and insects that may be a source of contamination to fresh produce.
<b>Planting materials</b>	Seeds, seedlings, young plants, roots, corms, bulbs, bits and suckers used for planting to establish crops.
<b>Postharvest</b>	Any activity that is undertaken to produce that has been harvested.
<b>Postharvest water</b>	Water used after produce has been harvested. Includes water dumps, flumes, washing, grading, cooling, ice production/icing, and water used during postharvest treatments.
<b>Preharvest</b>	Any activity that is undertaken on-farm prior to the harvest of a crop.
<b>Preharvest water</b>	Water used prior to harvest. Includes water used for irrigation, foliar fertiliser and chemical spray application.
<b>Produce (fresh produce)</b>	Includes but is not limited to fresh fruit, vegetables, herbs and nuts.

<b>Term</b>	<b>Definition</b>
<b>Product specification</b>	Establish specific criteria for produce to meet. Product specifications will often include a description of the required features and quality of the product (variety, maturity, colour, etc.); any specific handling requirements (temperature management, handling instructions, packaging, transport, etc.); and any specific food safety requirements (compliance with a nominated standard such as Freshcare Food Safety & Quality).
<b>Property map</b>	Any combination of aerial photographs and topographical, cadastral or self-drawn maps or map overlays that document the relevant boundaries, infrastructure and features on, or adjacent to, the property.
<b>Recall</b>	Action taken to remove produce from the supply chain if there is a food safety or potential food safety risk to consumers. A consumer level recall involves recovery of produce from consumers and businesses in the supply chain whereas a trade level recall only involves recovery of produce from businesses in the supply chain.
<b>Record</b>	Documentary evidence to support compliance with the Freshcare Code of Practice Food Safety & Quality. The medium can be paper, photographic or electronic, or any combination thereof.
<b>Risk</b>	The chance of a hazard occurring, measured in terms of likelihood and severity.
<b>Risk assessment</b>	An assessment of both the likelihood and the severity of the consequences should a hazard occur. This gives a guide as to the overall significance of the risk.
<b>Scope</b>	Business production activities undertaken, for which Freshcare Certification is required. The Scope will include a description of the business type (grower only, grower and packer, or packer only), site addresses, the crops grown, and the destination market (if known).
<b>Signature</b>	A personal recording by the individual of their name or a mark representing it. Signatures can be produced manually by the individual in written, digital or electronic format.
<b>Supplier</b>	An individual or business that supplies materials or services.
<b>Training</b>	Provision of knowledge and skills to perform tasks to a specified competency. Training can be delivered on-the-job or through qualified external providers.
<b>Verification</b>	A set of procedures, processes and tests designed to ensure the food safety system is working effectively.
<b>Waste</b>	Unwanted, unusable and rejected materials.
<b>Withholding Period (WHP)</b>	The required period of time that must elapse between the crop treatment and harvest.
<b>Workers</b>	All people working in the business, including family members, staff and contractors working on the property or in the business.

**IN THE FAIR WORK COMMISSION**

***Fair Work Act 2009 (Cth)***

**s.156 – FOUR YEARLY REVIEW OF MODERN AWARDS**

**AM2014/231 – HORTICULTURE AWARD 2010**

**AM2016/25 – MITOLO GROUP PTY LTD AND AUSTRALIAN INDUSTRY GROUP  
JOINT APPLICATION TO VARY THE HORTICULTURE AWARD 2010**

**WITNESS STATEMENT OF ROBIN ANNE DAVIS**

I, Robin Anne Davis of Level 1, 145 South Terrace, Adelaide, South Australia, do solemnly and sincerely declare and state the following:

1. I make this statement from my own knowledge and belief except where otherwise stated.
2. I am the CEO of Potatoes South Australia Inc (**Potatoes SA**).
3. Potatoes SA is the Peak Industry Body for the potato industry's value chain and is the voice for seed producers, growers, fresh market, packers, processors, marketers, exporters, wholesalers, retailers, and other service providers in the chain to the consumer. Incorporated in 2011 and in operation since February 2012, the organisation is independent and governed by an elected Board of a maximum of ten directors comprising industry leaders and professional independent directors. It is based in South Australia but is closely allied to and collaborates with other potato industry and horticultural/agricultural organisations across Australia.
4. I have been the CEO of Potatoes SA since August 2012.
5. Prior to becoming CEO of Potatoes SA, I worked as a self-employed Agribusiness Consultant in both Australia and South-East Asia. I did this for approximately 10 years, from August 2002 to May 2012.
6. From September 1999 to December 2000, I was employed as an Associate



for INSTATE (International Strategic Analysis Team).

7. From October 1997 to July 1999, I was employed as Manager - International Trade and Investment for the Department of the Premier and Cabinet, Government of South Australia.
8. As CEO of Potatoes SA my main responsibilities are:
  - demonstrating a robust representative organisation which is the voice of the potato industry value chain;
  - liaising with all stakeholders in the potato industry value chain and developing stakeholder networks;
  - advocating and lobbying on behalf of the industry at all levels of government;
  - developing industry-led, state and nation-wide research and development (**R&D**) projects; and
  - developing and implementing management and financial processes, funding and strategic plans.
9. In this role I have high levels of engagement with stakeholders at all levels of the potato industry value chain, from the production end to the consumer. I regularly interact with potato producers in South Australia through the industry events and R&D projects that we conduct and also through Board Meetings (as the majority of Directors are primary producers). In addition, I frequently liaise with affiliated bodies nationally and internationally.
10. In my previous role as an Agribusiness Consultant I consulted for corporate and institutional clients throughout Australia and South-East Asia in areas including: value chain analysis, workforce development, risk management in primary industry supply chains (seafood, grain, horticulture, beef cattle), cold chain management, project management, business and strategic planning, sustainable environmental initiatives and policy development/interpretation.

11. In addition to being CEO of Potatoes SA, I am a primary producer of beef cattle at Campbell Park in the upper south east of South Australia. This operation commenced in 2003.
12. I am also currently on the following committees:
  - Chair, Project Advisory Committee – South Australian River Murray Sustainability (**SARMS**) “Transforming Riverland food loss and industry waste into profit” (Primary Industries and Regions SA/South Australian Research and Development Institute/Australian Wine Research Institute);
  - Chair, Steering Committee – Innovative Nutrient Management in the Australian Potato Industry (Federal Department of Agriculture and Water Resources);
  - SA Division, Committee Australian Indonesian Business Council (**AIBC**).
13. In 2016, I was the recipient of the Rural Industries Research & Development Corporation (**RIRDC**) Rural Women’s Award in South Australia.
14. I hold a Bachelor of Agricultural Science and Master of Business Administration from the University of Adelaide. I am also a Graduate of the Australian Institute of Company Directors.
15. I have read and considered the joint application of the Mitolo Group Pty Ltd (**Mitolo**) and Australian Industry Group (**Ai Group**) to vary the coverage clause of the Horticulture Award 2010 (**Horticulture Award**) for the purpose of this statement.

### **The Potato industry**

16. Some key facts about the potato industry that I am aware of from my role as CEO of Potatoes SA are:
  - Potatoes represent the third largest food crop globally and are considered to be the number one vegetable crop in the world;

- Potato production constitutes about 20% of all vegetable production in Australia and contributes in excess of \$0.5 billion to the national economy every year. It is in the top two highest commodity groups sold in value and volume in the country;
- Although potato production occurs around Australia (with the exception of the far northern areas where temperatures exceed the optimal growing condition) the largest volumes of potatoes are harvested in the cooler states of South Australia, Tasmania and Victoria;
- The South Australia potato industry is Australia's largest, supplying about 80% of the nation's fresh washed potatoes;
- The South Australian potato industry is the largest horticultural sector in South Australia, contributing in excess of \$440 million annually to the state's economy and employing over 2000 people;
- South Australian growers produce more than 385,000 tonnes of potatoes each year and cultivate more than 11,900 hectares.

### **Potatoes SA's members**

17. Potatoes SA represent the potato industry in South Australia, covering stakeholders across the whole value chain (from seed production to the end-consumer).
18. However, due to substantial vertical integration and amalgamation in the industry, the organisation's focus is not strictly confined to state borders and many of our members operate interstate and/or overseas. We seek to unify the industry at both state and national levels.
19. The potato producers that Potatoes SA represents constitute approximately 95% of all potato producers in South Australia. This is made up of about 35 companies/businesses that range from small enterprises to vertically integrated corporations that are some of the largest in the Southern Hemisphere.

20. Compared to the other states and territories, South Australia has a concentration of very large potato corporates. The fresh sector in South Australia contains the 6 largest companies in the fresh sector Australia-wide. Five of these six companies are members of Potatoes SA.

### **The production of potatoes in South Australia**

21. Historically potato production in South Australia has occurred in the Northern Adelaide Plains region and in the Adelaide Hills.
22. However, with advanced water technology, production has developed in new regions such as the Mallee.
23. Today the main growing regions in the fresh sector in the state are the Northern Adelaide Plains (approximately 10% of production) and Murrayland/Riverland/Mallee (approximately 45% of production).
24. The typical potato production chain involves seed selection and trialling, planting, raising, cultivating, harvesting, washing, grading and packing for despatch.
25. In South Australia potatoes can be grown and harvested throughout the year (apart from a potential small gap in October). Because of this, the supermarkets generally receive the produce within 24 hours of it being harvested.
26. Therefore, unlike in Europe, where potatoes are only grown 3 months of the year and have to be stored, the potatoes produced here do not require storage for long (less than 24 hours).
27. To grow potatoes large quantities of land are needed. This is primarily due to the following:
- Potatoes are a broad-acre crop and are irrigated under centre pivot irrigation;
  - Potatoes are grown in a rotation as they are highly susceptible to pathogens and therefore disease. Because of this, once potatoes have

been grown in one paddock they cannot be grown there again for at least 3-4 years so the pathogen levels can go down. Other crops such as carrots, onions and cereal or pasture are developed during this period.

28. Once potatoes have been grown and harvested they are generally transported very quickly to centralised washing and packing facilities. In South Australia these are located primarily in Virginia.
29. It is common for potato producers with multiple growing sites to have a single, centralised washing/packing facility for the washing, grading and packing of potatoes. This increases overall efficiencies for preparation for sale and despatch of product to the major retail chains.
30. These washing/packing facilities are highly sophisticated, with advanced technologies and represent millions of dollars of investment. It would be impossible and nonsensical from both a financial and operational efficiency perspective to have more than one such facility.
31. Potatoes are taken to the washing and packing facilities to be washed, graded and packed in order to meet the fitness for purpose specifications set by buyers (for example, retail chains or processors).
32. Potatoes cannot be sold straight from the paddock following harvest. They are not fit for sale until they have gone through the necessary process of washing, grading and packing.
33. The retail chains in Australia have very high specifications that the potatoes sold to them under contract from producers are required to meet. These specifications include regulations set by the government in relation to food safety as well as their own regulations.
34. To my knowledge, the specifications set by Australian retail chains are some of the highest standards in the world. They cover everything from the size, shape and skin of the potatoes to how they are graded and packed.
35. Potatoes need to be properly washed, graded and packed in order to be fit for

purpose and comply with the supermarkets' specifications otherwise they will not be accepted for sale.

36. Preparing potatoes for the first point of sale is therefore an integral part of the potato value chain.
37. Regardless of where they are undertaken, the washing, grading and packing of horticulture crop such as potatoes are activities that are horticultural in nature and part of the horticulture chain.

### **The corporate structure of potato producers**

38. It is common practice within the South Australia potato industry for businesses to be comprised of multiple legal entities.
39. This is mostly due to family structural and financial risk management requirements but also because of the volatility of farming, drought impact, regional and remote localities and the nature of the fresh produce industry.
40. The industry has followed a natural process of farm aggregation resulting in typically larger grouped enterprises having the scale to remain in business through more integrated operations and structures that mirror both rural family ownership and succession. This has been a long term process that has created common multi-node organisational structures.

### **The 'farm gate' value**

41. The 'farm gate' value is a widely used agricultural term that means the value of produce at the first point of sale. It is understood in the industry as the market price that the primary producer receives.
42. For example:
  - If potatoes are being processed into French fries, the farm gate value of the potatoes is the value at which the potatoes are sold to the food manufacturer (e.g. McCain Foods) for (this is the first point of sale);
  - If potatoes are being taken directly to the retail chain, the farm gate

value of the potatoes is the value at which they are sold to the supermarket for (this is the first point of sale);

43. Potato producers in South Australia have an annual farm gate production worth in excess of \$208 million. This means that the value of potatoes at the first point of sale (i.e. when the potatoes leave the primary producer) is worth in excess of \$208 million.
44. In this context, the 'farm gate' is virtual – not physical. It means the point in the value chain when the product is fit for purpose and the first point of sale.

**The impact if the Horticulture Award 2010 did not apply**

45. There is widespread anxiety amongst Potatoes SA members about the possibility of labour costs increasing and what this will mean for the industry, if the Horticulture Award no longer applied to all of their operations and they instead had to apply the Storage Services and Wholesale Award 2010.
46. From my regular interactions with potato producers and the Directors of Potatoes SA, I am aware that labour is typically the highest input cost in production.
47. The potato industry is currently looking at ways to expand exportation as there is considerable growth potential within the Asian market due to rapid population increases. However, one of the major barriers to exportation is high labour costs. Australia is currently the most expensive producer of potatoes in the world which makes it difficult for producers here to compete on price. Increasing labour costs would even further diminish the potato industry's ability to compete on a global level.

**Date:**

**TO BE DECLARED IN THE WITNESS BOX**

**IN THE FAIR WORK COMMISSION**

**Fair Work Act 2009 (Cth)**

**s.156 – FOUR YEARLY REVIEW OF MODERN AWARDS**

**AM2016/25 – MITOLO GROUP PTY LTD AND AUSTRALIAN INDUSTRY GROUP  
JOINT APPLICATION TO VARY THE HORTICULTURE AWARD 2010**

**WITNESS STATEMENT OF GODFREY MARK WYNNE CODY**

I, Godfrey Mark Wynne Cody of [REDACTED], South Australia, do solemnly and sincerely declare and state the following:

1. I make this statement from my own knowledge and belief except where otherwise stated.
2. I am the CEO of The Primary Skills Industries Skills Council.
3. The Primary Industries Skills Council is the peak skills advisory board in South Australia for all Primary Industry sectors and provides advice to National and State agencies on all workforce matters including the development of national competencies and qualifications, specific skill shortages, appropriate training responses to skill demand and shortages and workforce plans that address such issues as industry restructuring, growth and technological change. The Bi-partite Board is made up of a cross section of people representing all major sectors of the industry. The Council regularly undertakes surveys of the industry and provides expert evidence to various Government agencies, Select Committees and Tribunals.
4. I have been the CEO of the Primary Industries Skills Council since 2004
5. Prior to becoming CEO of the Primary Industries Skills Council I had a senior career with the Commonwealth Government including developing the national vocational education and training system in my role as National Evaluation Officer for the National Competency Based Training Secretariat.



6. I was also an elected member and Chairman of Mallala Council for a period of eight years. The Council covers a significant portion of the State's horticulture industry on the Northern Adelaide Plains and adjoins the Virginia Horticulture region.
7. I have run a farm property east of Two Wells for some 30 years and worked with horticulture growers across South Australia since 1980 as well as assisting them in a variety of consultancy roles.
8. I am currently involved in both training and industry development areas of the industry and am actively engaged in establishing high technology horticulture businesses across Asia, some involving existing businesses on the Northern Adelaide Plains.
9. I have been involved in the development of Modern Awards in the Seafood Industry and provided comment on the Horticulture Award during its formative and review process.
10. I am familiar with the issues surrounding Mitolo Group Pty Ltd (Mitolo) and the joint application of Mitolo and Australian Industry Group (**Ai Group**) to vary the coverage clause of the Horticulture Award 2010 (**Horticulture Award**).

### **The Horticulture Industry**

11. I am very familiar with the range of growing systems in the industry and the differing technologies that are used to produce food. Irrespective of the various systems that are often crop specific, there are generally accepted food production activities that are directly associated with horticulture and have been for many decades.
12. These activities broadly involve seed selection and trialling activities, preparation for planting or growing (cultivation, fertilisation), growing activities (planting, watering and raising), harvesting of produce, cleaning (washing), sorting (grading) and preparation of produce for sale (packing for despatch) in a variety of forms such as bags, boxes and bins.
13. These activities are generic across the industry and constitute and broadly define the scope of activities that are within the horticulture industry in Australia.

Witness Statement of Godfrey Mark Wynne Cody

14. The structure of the industry has changed over time to reflect new technologies, more efficient growing systems and demand for higher skilled employees. In common with other primary industry sectors there has been a gradual shift away from more traditional single nuclear farming operations towards more corporate style and larger scale farms that operate with higher production volumes often from a number of growing sites. Despite these developments the industry maintains the core activities outlined in paragraph 12 albeit with improved technologies that produce product in a wide variety of growing environments from open field and orchard to climate controlled greenhouses and a number of growing systems in between.
15. The perishable nature of most horticulture product requires fast despatch from the farm to customers. Generally, product is prepared for sale and despatched in one operation although some product may be held for short times in cool rooms awaiting transport. This harvest and despatch process is driven by two forces, the harvest period which is driven by natural ripening of crops and actual demand from customers which can vary considerably from day to day during any harvest period. This variability requires flexible work responses to deal with this highly variable customer driven demand and more importantly constantly changing climate forces.
16. As crops cannot generally be grown on any available land, horticulture businesses seek suitable growing sites for their crops and harvest and prepare product for sale either directly at that site or at other sites that act as receiver sites for product from multiple paddocks or growing sites. In many instances smaller growers also send their product to other horticulture businesses for preparation for sale to their customers. This process provides greater efficiencies for businesses and ensures viability of the smaller businesses guaranteeing continued employment.
17. The location of any “shed” in relation to a particular growing site is determined by the particular efficiencies of each business operation. In the case of crops such as potatoes, the growing sites vary considerably from year to year due to the need to generally fallow each growing site for three years out of every four. This can substantially change the supply locations on an annual basis and

clearly require more centralised facilities to draw product from different growing locations annually. It also needs to be understood that a number of horticulture businesses may draw product from a very large number of growing sites in some cases in excess of 300 growing sites. Having a centralised facility is the only logical response in such cases given the likelihood that some growing sites would have non-operating shed facilities in fallow years.

18. It is important to remember that while the scale of some of these more centralised shed operations is larger than for more traditional single farm units, the processes of grading, sorting, washing, bagging, boxing etc is the same. The location, the size and the volumes of production of a particular shed do not fundamentally change the core activities that are part of the horticulture chain. By no stretch of the imagination can these facilities be compared to manufacturing storage areas or warehouse facilities. Their function is to clean the harvested product, sort and grade the highly variable product that has been harvested, and prepare sorted product for despatch to customers in various forms (bags, boxes, bins etc). Any storage is often for very short periods and mostly for second load or next day loading.
19. The technology that is employed in the more centralised washing/grading/packing facilities is advanced and it has to be to meet a whole set of quality and food safety issues that are required by customers, consumers and national laws. The horticulture businesses that have invested in the newer technologies have invested heavily to maintain viability in a very difficult supermarket environment which continues to squeeze grower margins to very low levels. It would simply not be possible or desirable to have decentralised washing/grading/packing facilities across thousands of growing sites across Australia.
20. The investment in the technologies found in the more centralised facilities cover a wide range of specifications set by customers especially retailers and food processors. Some of these specifications are extremely detailed in terms of colour, size, shape, skin, blemishes etc. Traditional small farm systems cannot afford the type of technology that must be employed to meet these requirements.

21. The trend towards larger business entities is evident across all primary industry sectors and has been occurring for several decades. Part of this is driven by natural market forces, part by a declining youth population in most regional areas, part by an ageing of the rural workforce and part by limited investment capacity amongst smaller growers. The new larger businesses often have multiple entities reflecting family investment, succession planning and risk management. This latter component relates to both climate variability and financial risks associated with market forces.
22. The development of the Horticulture Modern Award took into consideration a number of pre-existing State Awards many of which had adopted definitions that went back to the 19<sup>th</sup> Century. Whilst the Award has provided some industry and enterprise definitions, some of these have clearly not reflected the actual nature of the industry and the work it performs. I hold the opinion that the major deficiencies of the current Award lie in the current definition of the Horticulture industry and the definition of a Horticultural enterprise.
23. At a meeting of growers that I attended in Virginia concerning the current Award Review process it was clear that most businesses want definitions that relate to the actual work performed and definitions that remove any ambiguity in relation to location or function. Of particular concern during that meeting and through subsequent discussions I have had with growers is the possibility of dual Awards covering the same industry functions with the Storage, Services and Wholesale Award also adding substantial costs to current labour costs and threatening the viability of many businesses.
24. Quite apart from the cost issue if the Storage, Services and Wholesale Award applied to horticultural activities, there is a real concern which I share regarding the integrity of Modern Awards and the need to preserve a very long standing tradition of Awards reflecting discrete industry work activities. Currently, due to ambiguous definitions, employees in the horticulture industry undertaking the same work are potentially covered by two Awards depending on the location of the business. The situation becomes even more confusing when employees employed for a period of time (harvest) in the central horticulture washing/grading/packing facility are transferred to the growing area of the

business. In the case of the Mitolo operation, there is a third layer of complexity currently when employees working for a period of time in the central horticulture washing/grading/packing facility undertake work in the seed selection and trialling area in the same complex as the main facility and around the facility.

25. The Award Variations proposed by the Mitolo Group and the Australian Industry Group address these issues by providing a much clearer set of definitions. These are in line with the horticulture chain that is more properly outlined in paragraph 12.
26. As someone who is actively establishing horticulture and aquaculture businesses across Asia, I am concerned that emerging food shortages as reported by the UN Food and Agriculture Organisation will worsen as global population and the growth in the Asian middle class impacts upon consumption in an environment of slowed growth in food production. I hold the view that horticulture production in both the Australian and Asian markets must be maintained and grown. I believe that varying the Horticulture Award to better reflect the core activities irrespective of location will provide security for the current workforce. Any splitting of the Horticulture Award along the lines that have been put forward by the National Union of Workers will result in a proportion of the industry investing overseas rather than expanding in Australia. This will result in a greater potential for fresh produce to be imported into Australia with a consequent loss of Australian jobs. This is a consequence that Modern Awards are supposed to avoid.

**Date:**

**TO BE DECLARED IN THE WITNESS BOX**